111-469

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1241.

THE KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL. W. A. JOHNSTON, ATTORNEY GENERAL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JANUARY 14, 1884.

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1 In the Supreme Court of the state of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
vs.
The Kansas Pacific Railway Company, defendant.

Be it remembered, that on the 12th day of July, A. D. 1883, there was filed in the office of the clerk of the Supreme Court of the state of Kansas a petition in the above entitled cause, which is in words and figures as follows, to wit:

2 In the Supreme Court of the state of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
vs.
The Kansas Pacific Railway Company, defendant.

Petition.

To the honorable judges of the Supreme Court of the state of Kansas:

W. A. Johnston, attorney general of the state of Kansas, who sues for the said state in this behalf, comes here before the judges of the Supreme Court of the said state, on the —— day of July, A. D. 1883, at the July term of said court for the said state of Kansas, and gives the said court here to understand and be informed that in the year 1855, at a session of the legislature of the territory of Kansas, an act of said legislature was duly passed, entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company," of which the following is a copy:

[LAWS OF 1855, P. 915.]

AN ACT to incorporate the Leavenworth, Pawnee & Western Railroad Company.

Be it enacted by the governor and legislative assembly of the territory of Kansas as follows:

SECTION 1. A company is hereby incorporated, called the Leavenworth, Pawnee & Western Railroad Company, the capital stock of which shall be five millions of dollars, to be divided into shares of fifty dollars each; the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make
3 and use a common seal and change and alter the same at pleasure, and shall be able in law and equity to make contracts; may take, hold, use, possess and enjoy the fee-simple or other title in and to any real estate necessary to carry out the provisions of this act, and no more, and may sell, convey, pledge, mortgage or

dispose of the same; may make by-laws, rules and regulations proper and necessary for carrying into effect the provisions of this act, not repugnant to the constitution or laws of the United States or of this territory, and shall have the usual and necessary powers of companies for such purposes.

SEC. 2. W. H. Russell, J. Marion Alexander, S. D. Lecompte, Amos Rees, James Davies, W. F. Dyer, Robert Wilson, James Findlay, E. S. Wilhoit, Edward H. Dennis, C. H. Grover, Wilburn Christison, M. P. Rively, Charles Hayes, and Cornelius M. Burgess, or any five of them, shall constitute the first board of directors under this act, and shall hold their office until their successors shall be qualified; they shall, within five years from the date of the passage of this act, meet at such time and place as shall be designated by any three of them, and organize as a board of directors; and when organized, they shall cause books to be opened for subscription to the capital stock of the said company, at such time and place as they may designate, under the supervision of such persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such books when necessary until the whole stock shall be subscribed.

SEC. 3. So soon as three thousand shares shall be subscribed, the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in two or more public newspapers.

SEC. 4. An election for nine directors shall be held on the first Monday in April in each year, and if not held on that day, an election may be held at any other time that the directors shall designate; the election shall be held under the supervision of three or more stockholders, and the persons receiving the highest number of votes shall be elected, and shall continue in office until their successors be qualified; every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy; soon after the election, the directors shall meet and elect one of their number as president, who shall hold his office for the term for which he was elected director, and until his successor shall be qualified.

SEC. 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company, and shall keep a journal of their proceedings, and shall cause correct books and accounts to be kept; they may determine by law what number of directors shall constitute a quorum, may appoint committees, and fill all vacancies in any office under said company; they shall fix the salaries of the president, and the officers and agents; they may take security of their officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

SEC. 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner
4 as they may deem proper, and if any stockholder shall fail to pay any such requisitions within ten days after the time ap-

pointed, the said company shall recover the same with interest, and if not collected may direct the stock forfeited, and sell the same; and no delinquent stockholder shall vote in said company.

SEC. 7. Said company shall have full power to survey, work, locate and construct a railroad from the west bank of the Missouri river, in the town of Leavenworth, in this territory; and from thence west to the town of Pawnee or to some point feasible and near to the government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the territory, and for that purpose may hold a strip of land not exceeding one hundred feet in width, with as many set of tracks as the said president and directors may deem necessary: *Provided*, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses and water stations, and may extend branch railroads to any point in any of the counties through which the said road may be located; and said company shall have power to construct a branch road from any point in the main trunk of said road to the town of Kickapoo, on the Missouri river; no discrimination shall be made between the main trunk of said railroad and the branches connecting with the same, in regard to the rates of passage and the charges for freight shipped over the same.

SEC. 8. Said company shall take voluntary relinquishments of the right of way for said road, and the necessary depots and water stations; and if the land through which said road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minors shall have power to convey to said company so much of the land as may be necessary for the purposes aforesaid, on fair and equitable terms, but every such relinquishment shall be subject to the approval or rejection of the probate or other court in which such guardianship is pending. If any owner of any tract of land through which said railroad shall pass shall refuse to relinquish his right of way for said railroad to said company, or the necessary land for depots, engine or wood houses, water station, stopping stages, or turnouts, or if the owners be infants or persons of unsound mind, or non-residents of the territory, the facts of the case shall be especially stated to the judge of the District Court of the county, or presiding judge of the Court of Common Pleas of the county, as the case may be, in which such lands are situated, and said judge shall appoint three disinterested citizens of the county in which said lands are situated to view said lands, who shall take into consideration the value of the land, and the advantages and disadvantages of the road to the same, and shall report under oath what damages will be due to said lands or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned; notice of such application to such judge shall be given to the owner of such land five days before the making of the application, if such owner reside in this territory, or to his guardian; and if such owner be a non-resident of this territory he may be served with actual no-

tice or by an advertisement for four weeks in some public newspaper.

SEC. 9. The persons appointed to view and value such lands shall file their report and plat in the office of the clerk of the District Court or Court of Common Pleas, as the case may be, of the county in which the land or a part thereof is situated; and if no valid objections be made to said report the court shall enter judgment in favor of such owner against such company for the amount of damages assessed, and shall make an order vesting in said company in fee simple, title of the land in such plat and report described. Objections to such report must be filed in ten days; after the same shall have been filed, said objections shall be examined by said judge, in term-time or vacation, and he may hear testimony and by judgment confirm said report, or he may set the same aside and appoint three other viewers, who shall proceed in the same manner and make a report until a report is confirmed: *Provided*, In order that the progress of the work may not be impeded, that after said owners have filed their report and plat in the office aforesaid, the company, after having made a tender of the amount of damages to the person or persons entitled to the same, or made a deposit of the amount with the clerk of the court in which the case may be pending, shall be authorized to proceed in the construction of the work as fully as though no disagreement had arisen. In all such cases the court shall adjudge the costs of the proceedings according to equity, and the court shall have power to make such orders and take such other steps as will promote the ends of justice between the owners of such lands and the said company; and the said viewers shall be entitled to the same fees as are allowed to commissioners in partition under the statute.

SEC. 10. Said company may build said road along or across any public road or street or wall of any town or city and over any stream or highway; but whenever said road shall cross any public road, said company shall keep good and sufficient cause-ways or other adequate facilities for crossing the same; and said road shall not be so constructed as to prevent the public from using any road, street or highway along or across which it may pass; and when said railroad shall be built across any navigable stream, said company shall erect a bridge sufficiently high on which to cross, or shall construct a drawbridge, so that in no case shall the free navigation of such stream be obstructed. When any person shall own lands on both sides of said road, said company, when required so to do, shall make and keep in good repair one causeway or other adequate means of crossing the same.

SEC. 11. Said company shall commence the construction of said road within five years and shall complete the same within twelve years thereafter; and said company shall have general power to use, manage, control and enjoy said road; shall determine what kind of carriages shall be used thereon, and by whom or in what manner; and shall determine the terms, condition and manner in which mer-

chandise, property and passengers shall be transported; and shall have power to construct and keep such turn-outs, gates, culverts, toll-houses, depots, warehouses, causeways and other buildings, machinery and fixtures as may be necessary. Said company may receive such tolls and freights as may be determined upon by the directors, and shall keep posted up in their depots estimates of the rates of tolls and freight charged.

6 SEC. 12. Dividends of so much of the profits of said company as shall appear advisable to the directors shall be declared semi-annually, and be paid to the stockholders or their legal representatives, on application at the office of said company, at any time after the expiration of ten days from the time of declaring the same; but the dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby; and if the said directors shall make any dividend which shall impair the capital stock of the company, the directors consenting thereto shall be liable in their individual capacities to the company for the amount of capital stock so divided; and each director present when such dividend shall be declared shall be considered as consenting thereto, unless he immediately enter his protest on the minutes of the board and give public notice to the stockholders of the declaring of such dividends.

SEC. 13. At every annual meeting of said company the directors shall make to the stockholders an exhibit of the affairs and condition of the company; one-tenth part in interest of all the stockholders may call a meeting by giving four weeks' notice in two public newspapers.

SEC. 14. When said road shall be completed, the company shall file a plat thereof in the office of the secretary of the territory, or of the state or states, as the case may be, and the legislature may at any time require a statement from the company as to the progress of the work, the amount of business and the receipts of the company; and the books and accounts of said company may at any time be investigated by a committee appointed by the general assembly; and the said corporation shall make an annual report to the secretary of the territory, or of the state or states, as the case may be, of the operations of the year ending on the first day of December, which report shall be verified by the oaths of the treasurer and acting superintendent of operations, and filed in the office of the secretary of the territory, or of the state or states, as the case may be, by the third Monday in December, in each year, and shall state: *first*, the capital stock and the amount actually paid in; *second*, the amount expended for the purchase of land for the construction of the road, for buildings, and for engines and cars, respectively; *third*, the amount and nature of its indebtedness and the amount due the corporation; *fourth*, the amount received for the transportation of passengers, of mails, of property, and from all other sources; *fifth*, the amount of freight (specifying the quantity in tons) of the products of the forest, of animals, of vegetable food, other agricultural pro-

ducts, manufactures, merchandise, and other articles; *sixth*, the amount paid out for repairs; *seventh*, the number and amount of dividends and when made; *eighth*, the number of engine houses and shops, of engines and cars and their character; *ninth*, the number of miles run by passenger, freight and other trains, respectively; *tenth*, the number of men employed and their occupations; *eleventh*, the number of persons injured in life or limb, and the cause of such injuries; *twelfth*, whether any accidents have arisen from carelessness or negligence of any person in the employment of the corporation, and whether such person is retained in the service of the corporation.

SEC. 15. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any incorporated city, town, or incorporated company may subscribe to the stock of said company and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of such city, town or corporation.

SEC. 16. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the state or states through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued by persons to be mutually chosen by the state and by said company; but two years' notice shall be given to said company of the intention of the state to purchase said railroad.

SEC. 17. When any person ceases to be a stockholder he shall cease to be a member of said company.

SEC. 18. If any person shall wilfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixtures or improvement belonging to said company, he shall be considered guilty of a criminal offense and shall be punished in such manner as shall be prescribed by law; and shall also be liable to said company for all damages by it sustained.

SEC. 19. The operations of said company shall be confined to the general business of locating, constructing, making and using said railroad, and the acts necessary or proper to carry the same into complete and successful operation.

SEC. 20. The stock of said company shall be considered personal property, and shall be assignable and transferable according to such rules and restrictions as the board of directors shall from time to time make and establish, subject, however, to the laws of the territory or any future state erected out of this territory, as the same may be made. In case that it shall happen at any time that an election of directors shall not be made on any day when pursuant to this act or any regulations of said company it ought to have been made, the

said corporation shall not for that cause be deemed dissolved; but it shall and may be lawful on any other day to make and hold an election of directors in such manner as shall be regulated by the by-laws and ordinances of the company.

SEC. 21. Said company shall have power to receive and hold loans, gifts, grants, and donations of land, money or bonds in any quantity from this territory, or from any future state erected out of this territory, or the United States; and may sell, convey, pledge, mortgage or otherwise dispose of said land, moneys or bonds, or any part thereof, and apply the proceeds of the same to the construction of said railroad.

This act to take effect and be in force from and after its passage.

And the said attorney general gives the court further to
8 understand and be informed, that afterwards, in the year 1857, at a session of the legislature of the territory of Kansas, another and supplementary private act was passed, entitled "An act supplemental to an act entitled 'An act to incorporate the Leavenworth, Pawnee & Western Railroad Company,'" which said act reads and appears as follows:

[Private Laws of Kansas Territory, 1857, page 218.]

AN ACT supplemental to an act entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company."

Be it enacted by the governor and legislative assembly of the territory of Kansas as follows:

SECTION 1. The provisions of an act entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company," shall be and the same are hereby so extended as to enable said company to commence and progress with, at any time with nine years from the date of the passage of this act, the construction of a railroad, to be called the "Southern Branch and Gulf Railroad," beginning at some favorable point on the Leavenworth, Pawnee & Western Railroad, and following the most practicable route southwardly, to terminate on the southern boundary of the territory of Kansas, at some point where an easy connection may be had with a line of railroad extending through the Indian territory and state of Texas to the gulf of Mexico, under the same provisions, privileges, rights and restrictions as provided in the act to which this act is a supplement; and for said purpose the said company may increase their capital stock to ten millions of dollars, or any other amount necessary for the completion of the said road.

SEC. 2. The said company shall have, hold and enjoy the free right and privilege of keeping and maintaining a public ferry across the Missouri river, at the point or terminus of said road on said river; and also across other streams on the line of said road, where the said company may deem such ferry preferable to a bridge, or until such time as said company can procure bridges.

SEC. 3. The said company shall have power and authority at any time within nine years from the passage of this act, to commence and

continue the construction of a branch or branches of said road from any point on said road to any point on the southern or western boundary of the territory; and also to construct a branch from any point on the said road to any point on the northern boundary of the territory of Kansas, with all the privileges, powers and rights granted to said company by the act to which this is a supplement, and subject to all the restrictions and provisions of said act.

This act to take effect and be in force from and after its passage.

Approved February 23, 1857.

And the said attorney general further gives the court to understand and be informed, that in the month of January, 1857, at the city of Leavenworth, the said Leavenworth, Pawnee & West-
9 ern Railroad Company was duly organized by a subscription of $156,700 of stock, and the choice by the stockholders of a board of directors and other officers; that afterwards other subscriptions of stock within the limits of the charter were made, new directors and officers at various times chosen, and the company, pursuant to the provisions of its charter, was kept in constant and efficient existence. That the construction of the said road was commenced in May, 1857, and in that year surveys and profiles of the main line were made, and the location completed from Leavenworth to Fort Riley. In November, 1861, final estimates and adjustments of the line were commenced and continued, to determine the cost of said line from Leavenworth to Fort Riley, and thereupon the right of way and depot grounds were before the first day of January, 1862, duly obtained for a large part of said line. Before that time, by virtue of the twelfth article of the treaty with the Delaware Indians of 1854, and the third article of the treaty of 1860, a right of way for said railroad was secured through the Delaware Indian reservation, and also a right of way through the reservation of the Pottawatomie Indians was obtained by grant under and by virtue of the treaty of 1862. That said Leavenworth, Pawnee & Western Railroad Company, by the terms of a certain act of Congress, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," approved in the year 1862, was authorized to construct a railroad and telegraph line from the Missouri river at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, (meaning the Union Pacific Railroad Company's railroad and telegraph line,) and to meet and connect with the same at the meridian of longitude aforesaid; and by the terms of said act of 1862, and the amendment thereto of July 2, 1864, the said Leavenworth, Pawnee & Western Railroad Company, in connection with

a number of other railroad corporations chartered by several of the states of the Union and the Union Pacific Railroad Company,
10 directly chartered by the government of the United States, by virtue of said acts of Congress, was granted in aid of its construction large tracts of public land; and in addition thereto, the bonds of said Leavenworth, Pawnee & Western Railroad Company were guaranteed by the United States to the amount of sixteen thousand dollars per mile of said road from the Missouri river to a point at or near a place called Sheridan, on the projected line of said road. That afterwards the construction of said railroad under its charter was commenced and continued westwardly, from a point near the junction of the Missouri and Kansas rivers, towards the Fort Riley military reservation, and beyond in the direction of the Rocky mountains; that at some time before the passage of the amendatory act of Congress aforesaid of 1864, the said railroad changed its name from the Leavenworth, Pawnee & Western Railroad Company to the Union Pacific Railroad Company, eastern division, and was known by said name until the 5th day of April, 1869, when at a meeting of the stockholders of said company held at Lawrence, Kansas, at that date, a resolution was passed, which with the affidavit of D. M. Edgerton, secretary of said company, now on file in the secretary of state's office, at Topeka, Kansas, with a copy of said resolution, is hereto appended, and made a part of this information, as follows:

At the regular annual meeting of the Union Pacific Railway Company, eastern division, a majority of the stock of the company being represented, held at Lawrence, Kansas, April 5th, 1869, it was unanimously resolved that the name of this company be changed from that of the "Union Pacific Railway Company, eastern division," to that of the "Kansas Pacific Railway Company."

I hereby certify the above to be a true and correct record of the proceedings of the stockholders' meeting, held at Lawrence, Kansas, April 5th, 1869, as taken from the record books of the company.

[SEAL.] D. M. EDGERTON,
Secretary Kansas Pacific R. W. Co

ADOLPHUS MEIER, *Vice President.*

STATE OF KANSAS, COUNTY OF SHAWNEE, *ss.*

D. M. Edgerton, being duly sworn, says that he is the secretary of the Kansas Pacific Railway Company, formerly Union Pacific Railway Company, eastern division; that the name of said company was changed to the "Kansas Pacific Railway Company," by vote of its stockholders, on the 5th day of April, 1869, and a copy of the resolution and action of said stockholders of that date, as recorded on the books of the company, is above set forth; and this affi-
11 davit is made to supply the place of a former affidavit upon this subject, supposed to have been lost or mislaid in the office of the secretary of state.

D. M. EDGERTON.

Subscribed and sworn to before me, this 21st day of May, A. D. 1878.

J. THOMAS,
Notary Public.

STATE OF KANSAS, SECRETARY'S OFFICE, *ss.*

I, James Smith, secretary of state of the state of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing, filed in my office May 21st, A. D. 1878.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 29th day of May, 1883.

[SEAL.] JAMES SMITH,
Secretary of State.

And the said attorney general gives the said court to understand and be informed, that the said Leavenworth, Pawnee & Western Railroad Company, under its various changes of name, as hereinbefore set forth, constructed a railroad from Leavenworth, by the way of the Fort Riley military reservation, towards the summit of the Rocky mountains, in compliance with its said charter, and a railroad from a point at or near Wyandotte, at the junction of the Missouri and Kansas rivers, to a connection with said main road, at or near the city of Lawrence, in the state of Kansas, and thereupon continuously operated and controlled said railroad, and enjoyed the liberties, privileges and franchises thereof, up to the 24th day of January, 1880, under and by virtue of the said charter of 1855, and the supplementary act amending the same as hereinbefore recited. That on the 24th day of January, 1880, the said Kansas Pacific Railway Company wrongfully and unlawfully attempted to consolidate its said corporation with the Union Pacific Railroad Company, a corporation chartered under the said acts of Congress of 1862 and 1864, whose line runs from the Missouri river at or near Omaha, Nebraska, to Ogden, in Utah territory, and the Denver Pacific Railway and Telegraph Company, whose line begins at the city of Denver, in the state of Colorado, and runs in a westward direction to a junction with the said Union Pacific Railroad Company, at a place called Cheyenne, in the territory of Wyoming. And the said Kansas Pacific Railway Company unlawfully and wrongfully attempted to confer upon the said consolidated company all of its franchises, immuni-
12 ties, liberties and privileges granted by virtue of its charter aforesaid, and to merge the same into a pretended corporation not created by the laws of the territory or state of Kansas, nor owing any duty to the territory or state of Kansas, but a pretended corporation, created, if at all, by acts of Congress, and amenable only to federal control, and subject only as to its rights and the causes of action which might thereafter exist against it to the jurisdiction of federal tribunals.

The said attorney general gives the said court further to under-

stand and be informed that the said Kansas Pacific Railway Company unlawfully and wrongfully entered into articles of consolidation with said Union Pacific Railroad Company and said Denver Pacific Railroad and Telegraph Company, which were expressly in violation of its charter and in conflict with the duties and obligations owing by it to the state of Kansas under the provisions and terms of its charter aforesaid; and further, that said articles were in conflict with the laws of the state of Kansas respecting railroad corporations and the right of railroad corporations to consolidate, and were not compatible with said laws. The said articles of consolidation are in words and figures as follows, to wit:

ARTICLES OF UNION AND CONSOLIDATION

Between the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, forming the Union Pacific Railway Company.

Articles of Union and Consolidation.

Whereas the Union Pacific Railroad Company, a corporation duly organized and existing under the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," and the act of Congress of July 2, 1864, and various other acts amendatory of the foregoing, owns a line of railroad and telegraph extending from the Missouri river to Ogden, in the territory of Utah, a distance of 1,042 miles;

And whereas the Kansas Pacific Railway Company, described in the said act of Congress of July 1, 1862, as the Leavenworth, Pawnee & Western Railroad Company, the name whereof was afterward changed to that of the Union Pacific Railway Company, eastern division, and again subsequently changed to the Kansas Pacific Railway Company, is a corporation which is entitled to participate in the benefits of the said act of Congress of July 1, 1862, and of July 2, 1864, and the various acts amendatory thereof and relating thereto;

And whereas the said Kansas Pacific Railway Company owns and operates, as a branch of the Union Pacific Railroad, a rail-
13 road and telegraph line from a point connecting with the Missouri Pacific Railroad in Kansas City, in Missouri; thence from the Missouri river, at the mouth of the Kansas river, on the the south side thereof, with a spur from Wyandotte, in the state of Kansas, being from the east state line of Kansas to Denver, 639 miles in length, with a branch from a point on the main line near Lawrence to Leavenworth, 34 miles in length, in said state of Kansas, connecting at Denver with the Denver Pacific Railway, and is entitled to extend said railroad to the western boundary of the former territory of Kansas, to locate and construct branches of said railroad

in the counties of the former territory of Kansas, adjacent to the line of said railroad, as then located and defined by law;

And whereas the Denver Pacific Railway and Telegraph Company, under and by virtue of the said acts of Congress and of an act of Congress approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, eastern division, between Denver and the point of connection with the Union Pacific Railroad, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the territory of Colorado;" and of an act of Congress approved June 20, 1874, which, among other things, enacts that for all the purposes of the said act of July 1, 1862, and of the acts amendatory thereof, "The Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869," whereby and by force wherof the said Denver Pacific Railway and Telegraph Company is likewise entitled to participate in the benefits of the aforementioned acts of Congress of July 1, 1862, and July 2, 1864, and the various acts amendatory thereof and supplemental thereto and relating to tho Pacific system of railroads; all of which, whether particularly herein described or not, are, for greater certainty in this behalf, referred to and made part hereof;

And whereas the said Denver Pacific Railway and Telegraph Company owns a line of road one hundred and six miles in length, extending from Denver, where it connects with the said Kansas Pacific Railway, to Cheyenne, where it connects with the Union Pacific Railroad;

And whereas in the aforesaid legislation of Congress applicable to the above-mentioned three railroad companies it is provided that they may unite and consolidate their respective organizations;

And whereas each of the said above-mentioned three companies, by corporate action duly and severally had, have resolved, pursuant to the authority in that behalf vested in them by law, to unite and consolidate their respective organizations into one company, and have severally agreed to and with each other upon the term of such union and consolidation, being the terms herein embodied and expressed:

Now, this agreement of union and consolidation, made this the 24th day of January, A. D. 1880, between the said Union Pacific Railroad Company, party of the first part, the said Kansas Pacific Railway Company, party of the second part, and the said Denver Pacific Railway and Telegraph Company, party of the third part, witnesseth:

14 That the said parties have respectively agreed and do hereby severally agree to and with each other upon the following articles of union and consolidation of their respective organizations into one company, viz.:

ARTICLE I. The said Union Pacific Railroad Company, the said

Kansas Pacific Railway Company, and the said Denver Pacific Railway and Telegraph Company, in consideration of the premises, do hereby severally agree to and with each other to unite and consolidate, and do hereby unite, form, and consolidate their respective organizations, properties, and companies into one consolidated company, which shall succeed to, possess, and be entitled to receive from the government of the United States all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which the aforesaid three companies, respectively, at the date of this consolidation, are or may be entitled or subject to under the acts of Congress in that behalf, in place and substitution of said constituent companies so consolidated, respectively; and the said consolidated company assumes to and for itself all of the provisions of said acts of Congress, so far as applicable, relating or in any manner appertaining to said constituent companies, or either of them, including the power to sue and be sued in all courts of law and equity within the United States, whether federal or state, and the right of corporations organized under a law of the United States to remove causes from state to federal courts; and all of the provisions of the aforementioned acts of Congress and each of them, so far as in their nature applicable to the company hereby formed, shall apply thereto; it being the intent of the parties hereto and of these articles of union and consolidation to organize the company hereby formed under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company as fully as if the same were incorporated herein at large.

ART. II. The name of the said consolidated company hereby formed shall be "The Union Pacific Railway Company."

ART. III. The capital stock of the said Union Pacific Railway Company shall be fifty millions seven hundred and sixty-two thousand three hundred ($50,762,300) dollars, (being the total aggregate amount of the outstanding stock of the three constituent companies,) which shall be divided into shares of one hundred dollars each; and it shall be issued in lieu of the stock of the said constituent companies on the surrender thereof for that purpose by the respective holders thereof. Every stockholder in the Denver Pacific Railway and Telegraph Company and in the Union Pacific Railroad Company shall receive in place of every share of one hundred dollars surrendered a share of one hundred dollars in the new company; and every stockholder in the Kansas Pacific Railway Company, the shares in which are only fifty ($50) dollars each, shall receive in place of every two shares of the stock at the time held by such stockholder in such company a share of the capital stock of the new corporation, upon surrendering to the new corporation the certificates of stock held by such stockholder.

ART. IV. The said new corporation shall, without unnecessary delay, issue certificates of stock, in such form as may by the board of directors be deemed advisable; and such board

shall provide and adopt such rules and regulations as may be necessary and proper for the issuing and transfer of shares of stock of the said new corporation.

ART. V. The directors of the said Union Pacific Railway Company, to be elected by the stockholders at the annual meeting herein provided for, shall be fifteen in number, each of whom must be the *bona fide* owner of at least fifty shares of stock in the consolidated company. Such directors shall be chosen annually by a majority of the votes of the stockholders voting in person or by proxy at such election. And they shall continue to be directors until others are elected and qualified in their places. No person shall be a director unless he shall be qualified to vote for directors at the election at which he shall be chosen; and vacancies in the board of directors may be filled by the remaining directors at any regular meeting of the board. The directors of the said company shall annually, as soon as may be after their election, elect from their own number a president and vice president, and shall also elect a treasurer and secretary.

ART. VI. The following-named persons shall be the first directors of said corporation, viz.: Fred. L. Ames, Ezra H. Baker, Elisha Atkins, F. Gordon Dexter, Sidney Dillon, Russell Sage, Jay Gould, Solon Humphreys, David Dows, William L. Scott, Silas H. H. Clark, Thomas T. Eckert, John Sharp, Grenville M. Dodge, Carlos S. Greeley. The following-named persons shall be the first officers of the said corporation, viz.: President, Sidney Dillon; Vice-President, Elisha Atkins; Treasurer and Secretary, Henry McFarland. The said directors and officers shall continue in office until their successors are chosen, as provided in these articles.

ART. VII. Until otherwise duly provided, the annual meetings of the stockholders of the Union Pacific Railway Company shall be held at the company's office in the city of New York, on the first Wednesday following the fourth day of March in each year, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day. Notice of such meeting shall be given as may be prescribed by the by-laws. These provisions may be changed by the stockholders of the consolidated company at any annual meeting of the said stockholders.

ART. VIII. The parties hereto of the first, and second, and third parts hereby assign, transfer, set over, and convey unto the said Union Pacific Railway Company, the consolidated corporation hereby formed, all the rights, privileges, exemptions, and franchises of each of said companies, parties hereto, and all the property, real, personal, and mixed, and all choses in action, debts on whatever account of, owing or belonging to either of said companies, and all claims, demands, property, rights of way, leases, leasehold interests, branches, iron rails, rolling stock, tools and implements, and property of every description, name, and nature belonging to either of the said companies, with the appurtenances, to be held, owned and controlled by the said consolidated corporation, its successors and assigns, as fully and completely, to all intents and purposes, as the respective parties

thereto do or can now own, hold, use, enjoy, or control the
16 same; and the parties hereto agree to execute and deliver to said consolidated corporation instruments of transfer, or assignments, or other instruments proper or necessary carry out the covenants, conditions and provisions of this agreement. This assignment, transfer, sale and conveyance is made to the said consolidated corporation subject to all liens, charges and equities pertaining thereto.

ART. IX. Nothing in this agreement contained shall affect or prejudice any rights otherwise existing of the consolidated company to make such further increase of stock or bonds as said consolidated company may by law be entitled to make, or restrict the amount of stock or bonds which such consolidated company is by law authorized to issue or make. Nor shall anything herein contained affect or impair the right to issue all unissued bonds under the Kansas Pacific consolidated mortgage of date May 1, 1879, wherein Jay Gould and Russell Sage are trustees, but such unissued bonds may, notwithstanding this consolidation, be issued in the same manner, and with the same effect in all respects as if these articles had not been adopted and executed.

And it is expressly agreed that the stockholders of the consolidated company shall have all the powers which would have been possessed by the stockholders of each constituent company if this consolidation had not been effected, to ratify, approve, and carry out any contracts made by either constituent company, and requiring the ratification or approval of its stockholders.

The power of the Union Pacific Railroad Company to issue all unissued bonds under the mortgage of July 1, 1879, wherein the Union Trust Company is trustee, is fully and completely reserved.

ART. IX. The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation. But nothing herein contained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company. The corporate existence of the respective constituent companies shall not absolutely cease, *eo instanti*, on the consummation of the union and consolidation herein provided for, but shall remain and continue so far as necessary to carry out the intent and purpose hereof.

ART. IX. These articles of consolidation shall go into effect, and the consolidated company hereby formed shall come into existence upon the day on which a copy hereof is filed in the department of the interior, as provided in the legislation in Congress in that behalf.

ART. XII. The existing by-laws of the Union Pacific Railroad Company are hereby provisionally adopted, and shall apply to the company hereby formed until duly changed or repealed.

ART. XIII. All books, vouchers, records, instruments of title, cash, evidences of debt, contracts, and documents pertaining to the business or property of the said three companies, parties hereto, shall, without delay, be delivered to the proper officers of the
17 consolidated company, and the said books, records, and papers shall be deemed and taken, as far as necessary, as the records and books of said consolidated company; and said books, records, vouchers, and papers shall be subject to the proper examination and inspection of all persons interested therein.

ART. XIV. These articles may be amended and modified from time to time, and in such manner as the holders of two-thirds of the stock of the consolidated company may direct or approve.

ART. XV. This agreement shall be executed on the part of the respective parties hereto, by the proper officers, and under the corporate seals of said companies.

In witness whereof, the said parties have caused their respective corporate seals to be hereunto affixed, and the same to be attested by their respective presidents and secretaries, this the 24th day of January, A. D. 1880.

[SEAL.] THE UNION PACIFIC RAILROAD COMPANY,
BY SIDNEY DILLON, *President.*

Attest: HENRY MCFARLAND, *Secretary.*

[SEAL.] THE KANSAS PACIFIC RAILROAD COMPANY.
BY SIDNEY DILLON, *President.*

Attest: A. H. CALEF, *Secretary.*

THE DENVER PACIFIC RAILWAY & TELEGRAPH COMPANY,
[SEAL.] BY D. M. EDGERTON, *President.*

Attest: D. H. MOFFATT, JR., *Acting Secretary.*

The Union Pacific Railway Company has signified, and hereby signifies, its assent to and acceptance of the foregoing articles of union and consolidation, January 24, 1880.

[SEAL.] THE UNION PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*

The said attorney general gives the court further to understand and be informed, that by the terms of the said charter of the said Kansas Pacific Railway, the legislature of the state of Kansas might at any time require a statement from the said company as to the progress of its work, the amount of its business, and the receipts of the said company, and the books and accounts of said company might at any time be investigated by a committee appointed by the legislature; and further, it became the duty of the said company to make an annual report to the secretary of the state of Kansas, of the operations of the said railroad for the year ending on the first day of December, which report should be verified by the oaths of the

treasurer and acting superintendent of operations, and filed in the office of the secretary of state by the third Monday in December in each year, which statement should contain—first, the capital stock of said company, and the amount actually paid
18 in; second, the amount expended for the purchase of land for the construction of the road, for buildings, for engines and cars, respectively; third, the amount and nature of its indebtedness, and the amount due the corporation; fourth, the amount received for the transportation of passengers, of mails, of property, and from all other sources; fifth, the amount of freight, specifying the quantity and contents, all the products of the forest, of animals, all vegetable food, and all other agricultural products, manufactures, merchandise and other articles; sixth, the amount paid out for repairs; seventh, the number and amount of dividends, and when made; eighth, the number of engine houses and shops, all engines and cars and their character; ninth, the number of miles run by passenger, freight and other trains, respectively; tenth, the number of men employed, and their occupations; eleventh, the number of persons injured in life or limb, and the cause of such injuries; twelfth, whether any accidents have arisen from carelessness or negligence of any person in the employ of such corporation, and whether any such person is retained in the employ of the corporation. That the said Kansas Pacific Railway Company has wholly failed and neglected to comply with the foregoing duties and obligations owing by it to the state, under the terms of its said charter, but on the contrary thereof, the said corporation has removed all of its offices, all of its books of accounts and statistics, outside of the jurisdiction of the state of Kansas, and has and holds all its general offices, and all accounts of its operations, at the general offices of said pretended consolidated company, at the city of Omaha, in the state of Nebraska, and alleges and pretends that the said corporation, the Kansas Pacific Railway Company, no longer owes any duty under its said charter as aforesaid to the state of Kansas, but that it is controlled as to its chartered obligations by the acts of Congress creating the Union Pacific Railroad Company, and by the said unlawful articles of consolidation aforesaid.

And the said attorney general further gives the said court to understand and be informed, that the said corporation has violated the laws of the state of Kansas, made and enacted for its regulation, and no longer keeps a general office for the transaction of its business within this state; and no longer keeps such general office located at or near the main line of its road or route mentioned in its said
19 charter; and no longer keeps a general office within the state, and near its said route and road, at which said general office is kept the records and books of the said corporation, or the office of superintendent, general manager and director, secretary, auditor, treasurer, paymaster, general freight agent, and general ticket agent, under whatever name the duties usually appertaining to such offices may be transacted; and no longer keeps a general office within the

state of Kansas, and on or near the route or road of said company, in which books of accounts appertaining to the business of general manager or director, secretary, auditor, treasurer, paymaster, general freight agent, and general ticket agent, under whatever names the duties usually appertaining to such offices may be transacted, are now kept for the use and inspection of the state in the regulation and control of said corporation; but on the contrary thereof, the said corporation did remove its said general offices from this state, at or about the time of said pretended consolidation, to the city of Omaha, in the state of Nebraska, and placed the same under the absolute order, control and disposal of the said pretended consolidated company; and that at the said Omaha, in the state of Nebraska, are now located all of said foregoing offices, and all of said functions are exercised, and all of said books of accounts appertaining to the business of such offices, and the operations of said railroad, have ever since been and are now kept.

The said attorney general further gives the court to understand and be informed, that the said pretended consolidated corporation, the Union Pacific Railway Company, has possessed itself of all the property of the said defendant corporation, and holds, controls, operates and enjoys the same as a division, so called, of the property of said pretended corporation, to wit, "The Union Pacific Railway Company, Kansas Division," and the said corporation is wholly managed and controlled as to all its operations, and as to its traffic relations with the public, by the said general officers, and from the said general offices located at Omaha, in the state of Nebraska; and that the said general officers have placed in subordinate charge of the property of said corporation in the state of Kansas, a division superintendent whose only functions are to maintain the track and run the trains of said railroad company, under directions from said general offices, and a local freight agent and local passenger agent whose only functions are to make contracts with the public for the transportation of freight and passengers, under the direction and subject to the revision and rejection of the said general officers located at Omaha, Nebraska; that all the accounts of the operations of said railroad are kept at Omaha, Nebraska, and all the employés of said road, including the superintendent and agents aforesaid, are paid upon vouchers issued at Omaha, Nebraska, from said general offices, and the right of employing or discharging said superintendent and agents, and all subordinate employés upon said railroad, is absolutely held and controlled by the general manager of said pretended consolidated company at Omaha, Nebraska; and all claims against said railroad made by the people of Kansas along the line of said railroad for injury to or destruction of person or property, are referred to the said general officers in the city of Omaha, Nebraska, and all settlements which may be made thereon are subject to their absolute dictation and control; and that there is in the state of Kansas no officer or person clothed with full

power to contract with the public at large, in respect of any of the dealings of the public with said railroad in its operations.

And the said attorney general further gives the said court to understand and be informed, that since the said pretended consolidation aforesaid, the said Kansas Pacific Railway Company has wholly failed and neglected to designate some person residing in each county into which its said line of railroad runs, or in which its said business is transacted, on whom all process and notices issued by any court of record, or justices of the peace of such county, may or might be served.

And the said attorney general further gives the said court to understand and be informed that the said Kansas Pacific Railway Company has from the time aforesaid failed to file a certificate of the appointment and designation of such person in the office of the clerk of the District Court of the county in which such person resides, and the said company has wholly failed and neglected to perform the duties imposed upon it by law in the foregoing respects.

And the said attorney general further gives the said court to understand and be informed that by the terms of the said pretended consolidation the said Kansas Pacific Railway Company falsely
21 avers that it has consolidated with the Denver Pacific Railway and Telegraph Company and the Union Pacific Railroad Company; but the said attorney general charges the facts to be, that said lines of railroads so sought to be consolidated, at the date of said attempted consolidation did not connect at the state line of Kansas, so as to form one complete and continuous line of railway, but that on the contrary thereof the said Kansas Pacific Railway Company, prior to said pretended consolidation, operated its own line, together with the Denver Pacific Railroad and Telegraph Company's line, (operated under a lease,) as a parallel and competing line to the Union Pacific Railroad Company's line, and the said railroads so operated were, and at all times have been, up to the date of said consolidation, parallel and competitive lines, competing from their respective initial points, on the west bank of the Missouri river to the state of Colorado and territory of Wyoming, for the same business, that is to say: the Union Pacific, beginning at Omaha, Nebraska, and running to Cheyenne and Denver over its own and leased lines; the Kansas Pacific, beginning at Leavenworth and Kansas City, and running to Denver and Cheyenne over its own line, and the leased line of the said Denver Pacific Railroad and Telegraph Company.

The said attorney general further gives the court to understand and be informed, that the railroad of said defendant was constructed under and in pursuance of a special privilege and power, given and granted to said defendant company as the agent of the public, for that purpose, and the said railroad was and is the property of the state of Kansas, and one of her highways, over which she has, and of right ought to have, supreme and exclusive jurisdiction, as well as a perfect title. That the said corporation herein made defendant,

was, by the provisions of its charter, the servant of the state of Kansas, to construct the said railroad, and run, work and operate it for her, and in the interests of her people, so that all should have the necessary use of it for proper purposes and on proper terms; and in consideration of the engagement that this service should be faithfully performed, the said state of Kansas bestowed upon the defendant corporation the powers, privileges and franchises enumerated and defined in the act of incorporation and supplement thereto,
as hereinbefore set forth, but the said corporation has,
22 in fraud of its charter, without the consent of the state, and against her laws, repudiated its obligations, abandoned its duties, relinquished its franchises, put an end to its corporate existence (so far as by its own act it could do so), and diverted the aforesaid highway of the state, as if it were private property, to the use of a foreign corporation, outside of the jurisdiction of the state of Kansas and beyond the reach of her authorities, with the declared intent that it shall be operated and used and worked, not according to the laws of Kansas, made or to be made to protect the rights and interests of her people, but under and according to the provisions of other laws, alleged to have been enacted by the legislature of another government, for the regulation of another railroad, lying in another state.

Whereupon, and on consideration of the foregoing declarations, charges and informations, the said attorney general prays the advice and judgment of the said court in the premises, and due process of law against the Kansas Pacific Railway Company, in this behalf to be made to answer to the state of Kansas by what warrant it claims to have, use and enjoy the liberties, privileges and franchises aforesaid; and further, by what warrant it claims, and has exercised the right to put said railroad and its appurtenances into the possession and under the control of the above-mentioned foreign railroad company, and by what warrant it claims the right to maintain such foreign corporation in such possession, or in the enjoyment and exercise of the franchises and privileges bestowed by the state of Kansas exclusively on said Kansas Pacific Railway Company; and the said attorney general prays that, upon a due hearing hereof, the said respondent company be adjudged to have forfeited all its rights, liberties and franchises, and to be ousted from the same, and that the said corporation be thereupon dissolved; and that the said attorney general further prays that it be further adjudged that the said franchises, granted to the defendant by the state, have become relinquished, abandoned and forfeited to the state of Kansas, and that the same be resumed to the state, and that the state take possession of the said railroad, with all its appurtenances and fixtures, as public
property, and make such disposition thereof as may be thought
23 necessary to secure the rights of the state, saving the just interests of creditors and other third parties guiltless of the

frauds, wrongs and injuries herein charged against the said corporation and the members thereof.

W. A. JOHNSTON,
Attorney General of the State of Kansas.

J. S. BLACK,
W. H. ROSSINGTON,
A. A. HARRIS,
GEO. S. GREEN,
Of Counsel.

24 And also on the 6th day of August, A. D. 1883, there was filed in the office of the clerk of the Supreme Court of the state of Kansas a waiver of the issuance and service of summons, which is in words and figures as follows, to wit:

In the Supreme Court of the state of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
vs.
The Kansas Pacific Railroad Company, defendant.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
vs.
F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the board of directors of the Union Pacific Railway Company, defendants.

I hereby enter appearance of the defendants in both the above-entitled causes and waive service of process.

A. L. WILLIAMS,
Attorney for Defendants.

25 And afterwards, on the 2nd day of October, A. D. 1883, before said court in session at the Supreme Court room, in the city of Topeka, the following proceeding, among others, was had and entered of record, as follows, to wit;

The State of Kansas ex rel., plaintiff,
vs.
The Kansas Pacific Railway Company, defendant.

On stipulation of counsel for both parties herein it is ordered that the hearing of this cause be continued to the November, 1883, session of this court.

And afterwards, on the 31st day of October, A. D. 1883, there

was filed in the office of the clerk of the Supreme Court of the state of Kansas the answer of defendants, which is in words and figures as follows, to wit:

26 In the Supreme Court of the state of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
against
The Kansas Pacific Railway Company, defendant.

Answer.

Now comes the Kansas Pacific Railway Company, by John F. Dillon, J. P. Usher and A. L. Williams, its attorneys, and for answer to the petition herein filed by the attorney general of the state of Kansas, says:

I. That it appears by the name of the Kansas Pacific Railway Company for the purposes of this suit only, and that, as herein shown, it has been consolidated with certain other railroad companies entitled to participate in the benefits of the act of Congress hereinafter referred to as chartering the Pacific system of railroads, into a new company called the Union Pacific Railway Company.

II. It denies that it is a corporation created, or organized
27 or existing under the laws of either the territory or state of Kansas, and avers the fact to be that it is and has always been, a corporation created by and existing under an act of Congress, approved July 1st, 1862, entitled: "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes;" and an act amendatory thereof, approved July 2d, 1864, entitled: "An act to amend an act, entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes, approved July 1st, 1862," and other acts of Congress amendatory thereto, copies of which said two named acts of Congress of July 1, 1862, and July 2, 1864, are herewith printed and made part of this answer, and marked respectively as Exhibits A and B in Appendix No. 2, hereto attached.

And defendant further says that the Kansas Pacific Railway Company thus incorporated and existing by said act of Congress and said amendatory acts, proceeded to build, and did build its line of road on the route marked out by said acts of Congress and not otherwise or elsewhere, and under the franchises, rights and powers granted and conferred by said acts of Congress, and in the manner and under the terms prescribed by said acts and not otherwise. That the route thus selected and authorized by Congress was not the one mentioned and described in the charter of the Leavenworth, Pawnee & Western Railroad Company, nor was the railroad built by the Kansas Pacific

Railway Company, in any way ever constructed, managed or operated under said last mentioned charter, or any charter or legislation of the territory or state of Kansas.

28 Defendant further answering, says that Congress, intending to provide for the construction of a national highway from the Missouri river to the Pacific ocean, and to secure to the government of the United States the use of the same for postal, military and other purposes, and branches to connect the same at various points on the Missouri river with the main line or trunk, passed the aforesaid act of July 1, 1862, and for the same purposes, subsequently made several amendments thereof.

That as an integral part of the said scheme and purpose, Congress made provision in the said acts for the incorporation of a railroad company to construct a railroad from the Missouri River, at the mouth of the Kansas River, so as to connect with the Pacific Railroad of Missouri at its eastern end, and with the Union Pacific Railroad at its western end; and to accomplish the construction of said branch to connect the Pacific Railroad of Missouri with the main line or trunk of the road of the Union Pacific Railroad Company, and the other purposes set forth in the said acts of Congress, Congress itself directly conferred and granted the necessary rights, powers and franchises upon the persons composing the Leavenworth, Pawnee & Western Railroad Company, to become, and they did accordingly become, a corporation of the United States, with the same name, property, members and interests that they had in the then existing organization, but with the rights, powers and franchises directly granted, conferred and set forth in the said acts of Congress; and Congress required the said Kansas company to agree to the foregoing by filing its acceptance of the conditions of said act of July 1st, 1862, in the department of the interior, within six months after the passage of the last named act, and the said Leavenworth, Pawnee &

29 Western Railroad Company of Kansas did accordingly file such acceptance in the interior department within the time so limited.

That after the said acceptance was thus filed, the said company thus created and incorporated, by the names successively of the Leavenworth, Pawnee & Western Railroad Company, the Union Pacific Railroad Company, Eastern Division, and the Kansas Pacific Railway Company, under the authority and by means of the subsidies conferred and granted in that behalf by the said acts of Congress, and not under the authority conferred or granted by the territory or state of Kansas, constructed the road on the route selected, prescribed and authorized by Congress, and not on the route specified in the territorial charter, extending from a connection with the Pacific Railroad of Missouri, in the state of Missouri, near the mouth and on south side of the Kansas river, to the city of Denver, in the state of Colorado, a distance of 638.50 miles (of which 393.15-16 miles were subsidized by the bonds and 638 miles by a grant of lands of the United States), and a branch from Leavenworth to Lawrence

(subsidized by lands, but not by government bonds), a distance of 30.87 miles, which roads so constructed were continuously thereafter used and operated, and still are used and operated, under the authority derived from the said acts of Congress, and not under authority derived from the territory or state of Kansas, all of which was done by the procurement and with the assent of the state of Kansas. No other roads or branches have been constructed by this defendant except the said road to Denver and the Leavenworth branch, constructed and subsidized as aforesaid by lands and bonds of the United States.

III. This defendant says if it be true and shall be held that the effect of the said acts of Congress was not as aforesaid to
30 confer distinct and independent corporate capacity upon the Leavenworth, Pawnee & Western Railroad Company, or its members, as a corporation of the United States, under the name and designation of the Leavenworth, Pawnee & Western Railroad Company, that, nevertheless, the intent and legal effect and operation of the said acts of Congress, in connection with the legislative acts of the territory and state of Kansas, were directly to grant and to confer upon the said railroad company distinct, independent and plenary power and authority immediately derived from the Congress of the United States, and not from the territory or state of Kansas, to construct and operate the railroad, and only railroad that was afterwards built and operated, extending from the eastern terminus in Missouri, at the connection with the Pacific Railroad of Missouri to the city of Denver, including the branch from Leavenworth to Lawrence; that the same were constructed by the defendant under and solely by virtue of the powers, authority and franchises conferred and granted by the said acts of Congress, and not under and by virtue of any power, authority or franchises derived from or granted by the territory or state of Kansas; that said road and branch were built and equipped by means of the subsidies of bonds and lands received from the United States under and pursuant to said acts of Congress, and by means of money borrowed on mortgages authorized to be made by the said acts of Congress, and that the conditions of the said grants contained in said acts of Congress to the company have at all times been kept and performed by the company, and that the Government of the United States and the public are entitled to have the said road used, maintained and operated by the defendant or its successor, the Union Pacific Railway Company, as part of the Pacific system of railways, provided for in said acts of Con-
31 gress; that the Government of the United States has the right to have the said road kept in working order and operated to the end that it may at all times, and particularly in the time of war, have the use and benefits of the same for military, postal, and other purposes; and the right to have the net earnings and the compensation of the company for government service applied on the debt to the United States, as in said acts of Congress provided in this behalf; and the defendant says that it or its said successor is under corre-

sponding duties to the government, arising out of the said acts of Congress, and legislative contract with the government contained in the said acts accepted as aforesaid, the performance of which duties, or any part thereof, it is not within the power of the state of Kansas to prevent by legislation or judicial forfeiture; that to effect the ends of Congress, as specified in the said acts, the state of Kansas relinquished and surrendered to the Government of the United States the paramount and exclusive control, for all of the purposes declared in the said act, of the railroads that should be constructed under the authority conferred and granted by Congress as aforesaid, so far at least as to vest in the United States and in said company, as the representative therein of the United States, a contract right secured to it by the constitution and laws of the United States that the said company should at all times have and enjoy independent of any future action of the state of Kansas, each and all the powers and duties which, in and by the said acts of Congress it was stipulated and provided that the said company should at all times enjoy and perform. Defendant, further answering, says that among the conditions and provisions in the said acts of Congress it was expressly provided and enacted that the whole line of the said railway company and branches and telegraph should be operated and used for all
32 purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected continuous line; that the companies therein named in Missouri, Kansas, and California (including this defendant by name) should file their assent to the said acts, and that for the purpose of securing the operation of the said railroads and branches as one continuous line, it was, in and by the said act, further expressly stipulated and provided: "That at any time after the passage of this act all of the railroad companies named herein and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company."

And this defendant further says that, having filed its assent to the provisions of the said act, and having participated in the benefits conferred thereby, and so coming under the duty thereby imposed to operate its railroad as one continuous line with the other railroads enumerated in said act, and particularly with the railroad of the Union Pacific Railroad Company and the Denver Pacific Railway and Telegraph Company, this defendant found itself obliged and required in the performance of said duty and for the better service of the public and government, as provided by the said act, to form itself into one consolidated company with the said Union Pacific Railroad Company and the said Denver Pacific Railway and Telegraph Company as aforesaid; and this defendant avers that cheaper and better service to the government and public have resulted therefrom, as contemplated by the said act.

Defendant states and avers that it was at and before the date of said consolidation wholly unable to make payment of its debts and current interest charges, including those prior in lien to the United

States, and was in point of fact wholly disabled from making
33 the payments and performing the duties to the United States required by the said acts of Congress, without the said consolidation.

And this defendant avers that it thereupon entered into such consolidation, and that the consolidated company has ever since made said payments and performed said duties as required of the defendant by said acts of Congress, being thereto enabled by the fact of said consolidation and not otherwise.

And this defendant further avers and states that if the said consolidation were annulled by the judgment of this court or otherwise, then this defendant avers and states it would be and become unable thenceforth to make said payments or perform said duties as required by law, such consolidated relation being indispensable thereto.

And this defendant says that among its powers and contract rights were the power and right of this defendant to unite and consolidate its organization with that of any one or more of the companies authorized to participate in the benefits of said acts, andthe duty and obligation of this defendant or its successor by assignment or consolidation to pay the subsidy bonds received from the government at maturity, to keep the said railroad in repair and use, transmit mails, troops, and munitions of war, and public stores for the government whenever required to do so by any department thereof, giving the government at all times the preference in the use of the same for the purposes aforesaid, at the contract rates of compensation fixed in said acts; that until the said subsidy bonds and interest thereon were paid, to apply annually at least five per centum of the net earnings of the road to the payment thereof, and one-half of the compensation for services rendered by the said company to the payment of said subsidy bonds issued by the government in aid of the construction of said road; that for more than twenty years prior to the institution
34 of this suit the state of Kansas had assented to the said acts and had recognized and affirmed the paramount and exclusive control of Congress over the roads thus constructed by the defendant under the authority and by means of the right of way and subsidies of bonds and money granted by Congress; and so this defendant submits that no judgment in this proceeding can be rendered which would disable this defendant or its successor, the Union Pacific Railway Company, from discharging towards the government and the public every duty which the said acts of Congress enjoined and required of the defendant.

IV. Defendant further says that on the 3d of March, 1869, the Congress of the United States passed an act entitled, "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, eastern division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway & Telegraph Company, and to expedite the completion of railroads to Denver, in the territory of Colorado," for the purpose of authorizing this defendant "to contract with the Denver Pacific Rail-

way & Telegraph Company for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver city and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway & Telegraph Company as said line, and to grant to said Denver Pacific Railway & Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line," a copy of which said act of Congress is hereto attached, marked Exhibit D, in appendix 2, and made a part of this answer. In pursuance of said
35 act of Congress, this defendant made the contract therein authorized; the road from Cheyenne to Denver was accordingly built, and became, for the purposes of the act of Congress, a part of the Kansas Pacific Railway Company and of the Pacific system, so as to form the connection with the Union Pacific Railroad at Cheyenne, as originally contemplated in the act incorporating this company and the Union Pacific Railroad Company.

V. On the 24th of January, 1880, the Union Pacific Railroad Company, a corporation duly organized and existing under the act of Congress of July 1st, 1862, and the act of Congress of July 2d, 1864, being Exhibits A and B aforesaid, and various other acts amendatory of the same, and the Kansas Pacific Railway Company, a corporation also organized and existing under the acts of Congress last referred to, and the Denver Pacific Railway & Telegraph Company, which by an act of Congress, approved June 20, 1874, "That the Denver Pacific Railway & Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3d, 1869," entered into an agreement of union and consolidation, whereby the three companies severally agreed to and with each other to unite and consolidate, and thereby they did unite and consolidate their respective organizations, properties and companies, into one consolidated company, which succeeded to and became entitled to possess and receive from the Government of the United States all and singular the grants, benefits, immunities, guarantees, acts and things to be done
36 and performed, and became subject to the same terms, conditions, restrictions and requirements which the three companies respectively at the date of the consolidation were entitled to under the acts of Congress in that behalf, in place and substitution of the said constituent companies so consolidated; and the said consolidated company, by said article of consolidation, assumed to and for itself, that by the various acts of Congress hereinbefore recited, it was entitled to the benefit of all the provisions of said acts of Congress, so far as applicable, relating, or in any manner pertaining to said constituent companies or either of them.

It was provided by Article X of said consolidation as follows:

"ART. X. The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation. But nothing herein contained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company. The corporate existence of the respective constituent companies shall not absolutely cease, *co instanti*, on the consummation of the union and consolidation herein provided for, but shall remain and continue so far as necessary to carry out the intent and purpose thereof."

This defendant avers that the said consolidation was made, formed and effected in strict conformity with the said acts of Congress, and that the said articles of union and consolidation have, since their execution and filing in the interior department, been carried
37 out and consummated, as in this answer set forth, whereby and by force of the premises this defendant's organization has become united and consolidated with that of the consolidated company; new stock has been created and issued by the consolidated company, as hereinafter stated, and exchanged for the stock of the defendant and the other constituent companies, and the said consolidated company thus formed has succeeded in the place and substitution of this defendant and said constituent companies to all their roads and properties, rights, powers and privileges, and subject to their obligations to the government and to the public; that by force of the said consolidation and conveyances duly executed, the consolidated company acquired the roads built as aforesaid by this defendant, and the right to operate the same, and has since operated the same, fulfilling all of its duties to the government and to the public, as a part of the Pacific system of railways chartered and authorized by Congress as aforesaid, and this defendant, in its corporate capacity, disclaims any right or authority to impeach the said consolidation of the rights of the consolidated company acquired by reason thereof, or to exercise any corporate authority over the said railroads originally constructed by it and transferred to and vested in the consolidated company, or over their use and operation.

A copy of said articles of union and consolidation was duly filed in the department of the interior, January 26th, 1880.

A copy of said articles of union and consolidation, marked Exhibit C, in Appendix 3, hereto attached, is made part of this answer as fully as if set forth herein at length.

Defendant says that the term and conditions and manner of said consolidation were not incompatible with the said acts of
38 Congress or the laws of Kansas or of the state or states in which the roads of the said constituent companies were situate.

This defendant insists and alleges that its power to consolidate with the other companies as aforesaid, is derived from the said acts of Congress, which acts were assented to by the state of Kansas, and this defendant avers that in executing the said power of consolidation, it, as well as the other constituent companies, conformed with the terms and conditions which were required by the laws of the state of Kansas and the other states to effect a consolidation of railway corporations, under the laws of the said states, and furthermore acted within the powers conferred by the laws of Kansas and said other states upon this defendant and said other companies. To this end the said articles of consolidation were ratified and approved by due corporate vote of each of the said companies, and also by parties representing more than two-thirds of all of the stock of each of the constituent companies, including the said Kansas Pacific Railway Company, which ratification and approval on the part of the shareholders of said last named company were in writing, and a certified copy of the articles of consolidation, and of such ratification and approval were duly filed with the secretary of the state of Kansas on the 30th day of April, 1880, and also in the department of the interior.

Defendant says that prior to the 26th day of April, 1880, said articles of consolidation were ratified and approved by 199,084 shares out of 200.000 shares in the Kansas Pacific Railway Company, and that all of the shareholders of said company, with the exception of thirty-one shares, have since exchanged their shares of stock
39 for the stock of the consolidated company, all of which was done years before the present suit was commenced.

And the said articles of consolidation were in writing, duly approved and ratified on or about January 24, 1880, in conformity with the laws of Colorado, applicable to the consolidation of railways in said state, by every shareholder and stockholder in said Denver Pacific Railway and Telegraph Company, and the said articles of consolidation were also duly approved and ratified by a stockholders' vote at a meeting of the company duly called and held at the city of Denver, Colorado, on the 30th day of September, 1880, at which meeting every share but one was represented, and 39,999 shares voted for such approval and ratification, and none against it. Every share of the said stock of the said company has long since been exchanged for the stock of the consolidated company. Said articles of consolidation were duly filed in the office of the secretary of state of Colorado on the 2d day of August, A. D. 1880, and also in the department of the interior.

Said articles of consolidation were also approved and ratified, in writing, by more than two-thirds of the stockholders of the Union Pacific Railroad Company on about January 24th, 1880, and the same were also approved and ratified by a recorded vote of the stockholders of said company at a special meeting of the stockholders duly called and held in the city of Omaha, August 18th, 1880 Not a vote was cast against the ratification and approval of the said

articles of consolidation at the said meeting. Said articles of consolidation were duly filed in the office of the secretary of state of Nebraska, and also in the department of the interior. The consolidated company, soon after the consolidation was made, issued its stock in exchange for the stock of said constituent companies,
40 and all of the stock of the Union Pacific Railroad Company has long since been exchanged for the stock of the consolidated company, except 1,930 shares, most of which has, however, assented to the said consolidation.

The government directors officially reported on December 16, 1880, to the secretary of the interior, that the said consolidation had been made, and printed in their said report the said articles of consolidation *in extenso*. The auditor of railroad accounts, appointed under the act of Congress of June 19, 1878 (20 Stat., 169), also officially reported, on November 1, 1880, the said consolidation to the secretary of the interior, and the same was thereupon, by the said secretary, officially communicated to Congress, and the said consolidation has been recognized and acted upon by every officer and department of the government whose office and duty it is to act with respect to the said railroad. Ever since the consolidation aforesaid, the President of the United States has, in conformity with the opinion of the attorney general of the United States, regularly appointed, under the said acts, five government directors for the consolidated company, who have acted and still act with the company's directors in the management of the affairs and in the use and operation of the roads and properties acquired from the said constituent companies.

Since the said consolidation, the Union Pacific Railway Company has, in conformity with law, to provide "the means of meeting its obligations, improving, bettering and equipping its roads, and thereby increasing the value of the existing property, and to enable the company to afford better facilities to the public," increased its authorized capital stock to $61,000,000, divided into shares of $100, instead of $50,762,300, as fixed in the articles of consolidation. Defendant says that the present outstanding stock of the consolidated com-
41 pany held by the public is $60,868,500. On the 29th day of January, A. D. 1881, such increase of stock was officially communicated to the department of the interior, and the auditor of railroad accounts, in answer thereto wrote the solicitor as follows:

DEPARTMENT OF THE INTERIOR,
OFFICE OF AUDITOR OF RAILROAD ACCOUNTS,
WASHINGTON, D. C., *February 15th*, 1881.

DEAR SIR—Your letter of the 29th ultimo, with inclosures referring to the issue of additional stock by the Union Pacific Railway Company has been received.

The purpose for which this additional capital is to be used, as set forth in the circular of the 20th ultimo, and the fact that the entire amount is payable in money at the par value of the shares, preclude

any exceptions which might otherwise have been taken to this action on the part of the company. This additional capital must undoubtedly result in increasing the value of all the company's property and thus add to the security of all of its creditors.

Very respectfully,

THEOS. FRENCH,
Auditor.

Such increase of stock was communicated to Congress and no objection thereto made by it.

Said consolidated company has also issued and sold in the markets its negotiable bonds for money borrowed by it, to the extent of several millions of dollars, which bonds by their terms do not fall due for about twenty-five years.

The stock and securities of said consolidated company have been listed in the stock exchanges in New York, Boston, and elsewhere, and have been freely and largely dealt in by the public and
42 are daily bought and sold. The said consolidated company has over 4,000 stockholders in Europe and America.

Since the said consolidation was made all contracts touching the operation of the said roads and properties acquired by the consolidated company have been made by it, and conveyances for many thousand acres of lands in Kansas and elsewhere executed by it. On the faith of the said consolidation, the consolidated company has entered into numberless transactions, and incurred expenditures and liabilities amounting to more than $75,000,000.

Under the said acts of Congress to aid in the construction of the said road, the said Kansas Pacific Railway Company received United States bonds to the amount of $6,303,000, on which the interest accumulated to the 30th day of June, 1883, amounts to $6,129,333.09, all of which, both principal and interest, remains unpaid and is not due and payable for many years to come, except such portion of the interest as may be paid out of the application of five per cent. of the net earnings of the company and one-half of the compensation for services rendered to the government as provided in said acts.

This defendant under the express authority of this said acts of Congress, and not under any authority from the territory or state of Kansas, has executed the following mortgages upon its said road, equipment, and income, to wit:

Mortgage dated 1st day of August, 1865, due in thirty years from date, $2,240,000.

Mortgage dated 1st day of June, 1866, due in thirty years from date, for $4,063,000.

Income mortgage dated July 1, 1868, due in thirty years from date, for $4,275,650.

Mortgage dated 1st day of June, 1869, due in thirty years from date, bonds now outstanding, $6,310,000.

43 Mortgage dated 1st day of January, 1866, due in thirty years from date, on the Leavenworth branch, $600,000.

Consolidated mortgage dated 1st day of May, 1879, due in A. D.

1919, under which bonds are outstanding and unpaid for $15,640,000; and in all of the said mortgages this defendant conveyed its said road and franchises, and pledged its earnings. The principal sums in the said mortgages do not fall due for many years to come, and the interest on the fixed obligations of the company secured by the said mortgages has been and is regularly paid by the consolidated company.

VI. And defendant further says that if it originally was incorporated by the act of the legislature set forth in plaintiff's petition, as claimed by the plaintiff, it became entitled, by virtue of the acts of Congress hereinbefore set forth, to consolidate with the said companies as aforesaid, and that further authority to thus consolidate, even if it were incorporated by the territory of Kansas, was granted by an act of the state of Kansas, approved March 5th, 1862, entitled "An act relating to railroad companies," (Compiled Laws of Kansas of 1862, p. 767,) a copy of which said act of the legislature of the state of Kansas is hereto attached, marked Exhibit D, of Appendix 1, and made part hereof.

And the defendant further says that the conditions mentioned in the proviso to said section authorizing the consolidation as aforesaid were all duly complied with before said consolidation took effect. The defendant further says that said law, although general in its terms, has special reference to the Leavenworth, Pawnee & Western Railroad Company, to which company lands had then been ceded by the Potawatomie Indians, by a treaty then pending in the
44 United States senate, there being no other treaty pending by which such lands were ceded to any other company.

And defendant further says that the said Leavenworth, Pawnee & Western Railroad Company was authorized to make said consolidation by an act of the legislature of the state of Kansas, passed in 1865, section 22 of which is as follows:

[Extract from Laws of Kansas, 1865, p. 101.]

SEC. 22. Any railroad company in this state, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this state, into single corporation, in the manner following: First. Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the names and places of residence and number of the directors thereof, which shall not exceed nineteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, which will not be less than one hundred dollars, the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation, the manner of compensating stockholdeis in each of said two or more corporations who refuse

to convert their stock into the stock of such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this act.

45 And also by an act of the legislature of the state of Kansas, approved March 1, 1870, which reads as follows:

[Extract from section 1, of "An act to provide for the consolidation and extension of railroads in the state of Kansas," approved March 1, 1870. Laws of Kansas of 1870, p. 195.]

"*Be it enacted by the legislature of the state of Kansas:*

SECTION 1. Any two or more railroad companies in this state, existing under general or special laws, and owning railroads constructed wholly or in part, which when completed and connected will form a continuous line or lines of railroad, and any railroad company organized as aforesaid, and any railroad company duly organized and existing under the laws of an adjoining state, whose lines of railroad shall connect at the state line so as to form when completed a continuous line of railroad, are hereby authorized to consolidate and form one company owning and controlling such continuous line or lines of railroad, with all the rights, powers, privileges, and immunities, and subject to all the obligations and liabilities to the state, which belong to or rested upon either of the companies making such consolidation."

Defendant further says, that the state of Kansas at all times, until the passage of the joint resolution in 1883, authorizing this suit to be brought, has recognized this defendant as a corporation existing under and by virtue of the acts of Congress aforesaid, and subject to the exclusive control and regulation of Congress, by various concurrent resolutions adopted at different times; copies of which resolutions marked N, O, P and Q, in Appendix 1 hereto attached, are made a part of this answer.

Defendant says that by the resolutions, marked Exhibit N, adopted March 1, 1864, the legislature of the state of Kansas asked Congress to compel this defendant to make Wyandotte, Lawrence, Topeka, Wabaunsee, Manhattan and Junction City, points on its road, whereas, by the charter of the Leavenworth, Pawnee and Western Railroad Company, as conferred by the act of the territorial

46 legislature, said Leavenworth, Pawnee and Western Railroad Company had the chartered right to omit from its line of road all of said towns; and Congress in the said act of July 2d, 1864, conformed to the wishes of the state as thus expressed, by requiring the company to construct its road by the way of Lawrence and Topeka, or on the bank of the Kansas river, opposite said towns, which the company did.

Defendant further says that by the resolution marked Exhibit O, adopted in February, 1867, and P, adopted in 1868, the state of

Kansas urged Congress to extend further aid to said road, and to authorize its extension to the Pacific coast.

Defendant further says that by a resolution marked Exhibit Q, adopted in February, 1874, the state of Kansas expressly affirmed that Congress organized and created this defendant as one of the *branches* of the Union Pacific Railroad Company as incorporated by act of Congress, and complained that the Union Pacific Railroad Company was guilty of continued and persistent violation of law, "in its refusal to recognize the Kansas Pacific, formerly the Union Pacific Railway, eastern division, as one of the *branches* contemplated in the original act of July 1, 1862, and the subsequent amendments thereto, and by its further refusal to grant unto said Kansas Pacific, or Union Pacific Railway, eastern division, all the privileges, immunities and benefits as provided for" by said acts of Congress; and Congress accordingly passed the said act approved June 20, 1874 (18 Stats. at Large, 111).

VII. The defendant denies that its name was changed from Union Pacific Railway, eastern division, to Kansas Pacific Railway, on the 5th day of April, 1869, by action of its board of directors; and says that there was no authority, either under the act of Congress
47 incorporating the Union Pacific Railroad hereinbefore referred to, or under the act of the legislature of the territory of Kansas, incorporating the Leavenworth, Pawnee and Western Railroad, to change the name of the corporation under any circumstances; but it avers the fact to be that its name was changed to the Kansas Pacific Railway, by virtue of a joint resolution of Congress, approved March 3d, 1869, which reads as follows: "Joint resolution authorizing the Union Pacific Railway Company, eastern division, to change its name to the Kansas Pacific Railway Company. Be it resolved by the senate and house of representatives of the United States, in Congress assembled, that the Union Pacific Railway Company, eastern division, is hereby authorized, by resolution of its board of directors, which shall be filed in the office of the secretary of the interior, to change its name to the 'Kansas Pacific Railway Company,' approved March 3d, 1869," and not otherwise; and that the pretended act of the board of directors in changing the name set forth in the petition was without authority and void.

VIII. The defendant denies that the said Leavenworth, Pawnee & Western Railroad Company, under its various changes of name, as set forth in the petition, constructed a railroad from Leavenworth, by way of the Fort Riley military reservation, towards the summit of the Rocky mountains, under its said charter, derived from or granted by the territory of Kansas, or a railroad, under the said charter, from a point at or near Wyandotte, at the junction of the Missouri and Kansas rivers, to a connection with the main road at or near the city of Lawrence, and thereupon continuously operated and controlled said railroad, and enjoyed the liberties, privileges and franchises thereof up to the 24th day of January, 1880, under
48 and by virtue of the said charter of 1855, and the said supplementary acts amending the same; on the contrary thereof,

the said road, from its eastern terminus in Missouri to its terminus in Denver, and the said Leavenworth branch, were constructed and operated under the liberties, privileges and franchises conferred and granted, as hereinbefore set forth, by the said acts of Congress, all with the assent of the state of Kansas.

This defendant therefore denies that the said railroad of the said defendant was constructed under and in pursuance of the said privilege and power, given and granted by the territory or state of Kansas to the said defendant company, as the agent of the public for that purpose, or that the said railway is one of her highways, over which she has, and of right ought to have, supreme and exclusive jurisdiction, as well as perfect title, or any title whatever.

Denies that it was the servant of the state of Kansas to construct the said railroad, and to run, work and operate it for her, or that the state of Kansas has bestowed upon the defendant corporation the powers, privileges and franchises under which the said road to Denver or the said Leavenworth branch was built. Denies that the said defendant has, in fraud of its charter and without the consent of the state of Kansas and against her laws, repudiated its obligations, abandoned its duties, relinquished its franchises, put an end to its corporate existence (so far as by its own act it could do so), and diverted the said road of the state to the use of a foreign corporation, outside of the jurisdiction of the state of Kansas and beyond the reach of her authorities, with the declared intent that it shall be operated, used and worked, not according to the laws of Kansas, made or to be made to protect the rights and interests of her people,

but under and according to the provisions of other laws
49 enacted by the legislature of another government for the regulation of another railroad, lying in another state.

IX. Avers that the said company, pursuant to the authority contained in the acts of Congress of July 1st, 1862, and July 2, 1864, and March 3, 1865, issued and sold its first mortgage bonds at the rate of $16,000 per mile on the said road and Leavenworth branch, and under the said act of March 3, 1869, its first mortgage bonds to the extent of $32,000 per mile, as more particularly hereinafter stated, to borrow money to construct the same in Kansas and Colorado.

The said company, as required by section 20 of said act of Congress of July 1, 1862, and other acts of Congress, has made the reports therein prescribed to the secretary of the treasury and of the interior, and the legislation, territorial, state and congressional, has ever since 1862 received a practical construction with assent and acquiescence of the state, not to require the company to make the reports specified in section 14 of the said territorial charter of 1855. No such reports were ever required of the company, and no complaints to the company were made that they were not furnished; and if the company has been in default in this respect (which it denies), it has been unintentional and inadvertent, arising from a misconception of its duties under the law and with no desire to neglect or design to evade such duties.

X. This defendant denies that it has removed all of its offices outside of the jurisdiction of Kansas, and that it has and holds all its general offices, and all accounts of its operations, at the general office of the consolidated company at Omaha, as alleged; denies that it alleges and pretends that the Kansas Pacific Railroad
50 Company no longer owes any duty under the laws of Kansas to the state of Kansas, and is exclusively controlled as to its obligations by the said acts of Congress; but admits that it is advised by counsel that at least as to the roads in Kansas and Colorado, constructed as hereinbefore stated by authority of said acts of Congress, it derives it powers from and owes its duties under the said last-named acts, and not under the said charter granted by the said territory of Kansas, and that it has been united and consolidated into the Union Pacific Railway Company, as in this answer is set forth and shown.

Defendant denies that it has violated the laws of the state of Kansas, made and enacted for its regulation, in that it no longer keeps a general office for the transaction of its business within the state of Kansas, as stated in the said petition.

On the contrary, this defendant alleges that neither the said special charter of the said Leavenworth, Pawnee & Western Company, granted by the territory of Kansas, nor any other act of the legislature of Kansas, gave the said company any power or authority whatever to build a road to the mouth of the Kansas river, and to the south side thereof; and that the authority to build a road to the mouth of the Kansas river and to connect with the Pacific Railroad of Missouri was contained in the aforesaid acts of Congress chartering the Pacific system of railroads; and in and by the said charter the road which this defendant was authorized to construct was required by said acts of Congress to be constructed from the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri. The Pacific Railroad of Missouri was a state corporation, chartered by the state of Missouri, with power to construct a road from "the Mississippi river, or any other point
51 in the city of St. Louis, to any point on the western line of the state of Missouri which said company may select." The said Pacific Railroad of Missouri fixed its western terminus in the large and important city of Kansas City, in the state of Missouri, which city is situated near to, but not on, the state line of Kansas. This defendant, in order to make its connection with the Pacific Railroad of Missouri, as required by the said act of Congress, was obliged to construct, and did construct, about three-quarters of a mile of road into the said Kansas City, and into the state of Missouri, and into the Union depot in the said Kansas City, and there connected with the Pacific Railroad of Missouri and many other roads terminating in Kansas City, all of which was done many years ago, as required by the acts of Congress, with the assent both of the states of Missouri and of Kansas. The said Union depot in Kansas City is only 3,220 feet east of the state line of Kansas.

At Kansas City, and at or near the place of connection with the Pacific Railroad of Missouri, this defendant, like all other railroads terminating at Kansas City, established a general office and other offices for the transaction of business, adapted to convenience and wants of the public, which offices are on the main line of its road and distant a few rods from the state line of Kansas, and are to all intents and purposes and within the meaning and intent of said act within the said state of Kansas. Exclusively to locate the office of superintendent, general manager, director, secretary, auditor, paymaster, general freight agent, and general ticket agent away from the said terminus of the road and the said Union depot at Kansas City, and in the state of Kansas, away from other railroads and population and centre of business transacted by the company, would greatly injure the defendant and inconvenience the public,
52 and benefit nobody. Being advised, however, by counsel that the act of the state of Kansas of 1874, which required state corporations to keep their general offices in the state, did not apply to it, yet, nevertheless, desirous to give to the state of Kansas no just cause of complaint, and to incur no charge of violating its laws, this defendant also established and maintained within the limits of the state of Kansas all necessary and usual offices for the transaction of business located on or near the main line of its road, in the state of Kansas.

Defendant says, that by the second section of the act of Congress of July 2, 1864, it was provided that the stock of the Union Pacific Railroad Company should be "deemed personal property and be transferable on the books of the company at the *office of the said company in the city of New York*, or such transfer office as the company may establish." That by a joint resolution of Congress (15 Stats. at Large, 245) said company was authorized to hold its annual meetings "at either of the cities of New York, Washington, Boston, Baltimore, Philadelphia, Cincinnati, Chicago, or St. Louis." That on the 10th of April, 1869 (16 Stats. at Large, 56), the Congress of the United States, by joint resolution, "for the protection of the interests of the United States in the Union Pacific Railroad Company, and for other purposes," authorized the stockholders "to establish the *general office* of the company at such place in the United States as they might select." at a meeting to be held on the 22d day of April, 1869. At such meeting thus held, and pursuant to this authority, the company selected the city of *Boston* as the place in which to establish the general office of the company, and the same was then and there accordingly so established. By the 16th section of the said act of July 2, 1864, it is, *inter alia*, provided that
53 "all the provisions of the acts of Congress so far as applicable, relating or in any manner appertaining to the companies so consolidated, *or either thereof*, shall apply and be of force as to such consolidated organization." The Union Pacific Railroad Company had also an office established, under authority of acts of Congress, in New York for the transaction of its financial business, at which

city, for many years and at the date of the consolidation, resided the president of the company. The general office of the Union Pacific Railroad Company established in Boston and the office in New York, remained such offices until the said consolidation was effected, whereupon said office in Boston was adopted as the general office of the consolidated company, and the office at New York was established for like purposes as before the consolidation as the office of the consolidated company in New York, where the president of the last-named company has ever since resided and had his office as such president.

The secretary and treasurer of the consolidated company have their offices in the said general office in the city of Boston, at which place reside a number of the directors and a majority of the executive committee, who are accustomed to hold their meetings and to pass their resolutions there.

This defendant denies that it is wholly managed and controlled, as to all of its operations, and as to its traffic relations with the public, by the said general officers at Omaha, and from the said general offices located at Omaha, in the state of Nebraska; denies that the said general officers at Omaha have placed in subordinate charge of the property of said corporation, in the state of Kansas, a division superintendent, whose only functions are to maintain the track and run the trains of said railroad company, under directions from said general offices at Omaha, and a local freight agent and local passenger agent, whose only functions are to make contracts with
54 the public for the transportation of freight and passengers, under the direction and subject to the revision and rejection of the said general officers located at Omaha, Nebraska. On the contrary, there is a general superintendent of the road of the Kansas division, with the usual proper and necessary powers of such officer. Prior to the consolidation, the general manager and assistant general manager of the Union Pacific Railroad Company connected with the practical operation of the road had their headquarters at Omaha, where the company had commodious offices, and where many of the agents and employees of the company concerned in the management of its daily business reside; and this defendant admits it to be true that, under the direction of the corporation and subordinate to the Boston office, the accounts of the operations of the railroad are still kept at Omaha by the consolidated company, and that vouchers for the payment of the employees are issued from the auditor's offices located at Omaha; and says that the Kansas superintendent is subject to the control of his superior officers, as that they in turn are subject to the control of the board of directors and executive officers of the company. Defendant denies that all of the claims against it made by the people of Kansas along the line of said railway for injuries to person or property, are referred to said general offices in Omaha, Nebraska, and all settlements which may be made thereon are subject to their absolute dictation and control; and denies that there is in the state of Kansas no officer or person

clothed with full power to contract with the public at large in respect of any of the dealings of the public connected with the said railroad in its operations. On the contrary thereof, the said road has all the ordinary officers, agents and employees necessary for its eco-
55 nomical, safe and convenient operation, at its said terminus in Kansas City, and along the line in the state of Kansas; and they are under the control of the executive officers in Boston and New York, and constantly receive directions, orders and instructions from them, instead of receiving them from the said officers and offices at Omaha.

Defendant denies that it has violated any of the laws of the state of Kansas applicable to it in respect of keeping general and other offices in the state. It says, that under the acts of Congress aforesaid, the general office of the consolidated company and office of its treasurer and secretary, together with the records and books pertaining thereto, are rightfully kept by said officers in the company's general office in the city of Boston; that under the control of the Boston office, the general auditor has his office in the city of Omaha, and that the establishment of the company's offices at Kansas City is authorized by the act of Congress, applicable to the defendant and its successor, the Union Pacific Railway Company, and that the offices of the company, as maintained and kept in the state of Kansas, on and near the line of the road, is a compliance with the laws of Kansas, supposing them to be applicable since the consolidation, except so far as the obligations of the defendant and its successor in this behalf are modified by the said acts of Congress.

Defendant states that neither it nor the consolidated company has violated any duty in this behalf toward the state of Kansas; and if the law of Kansas in respect of general offices applies to this defendant or its successor, which, it is advised, and verily believes is not the case, it has still complied with those laws in all respects except as modified by said acts of Congress; and if said acts of Congress do not modify the requirements of the state laws in this regard, still the defendant and its successor have complied in substance and
56 effect with the requirements of said laws in this respect, without any design or desire to evade the same, and that any failure in this regard, if any, which it denies, has been unintentional and the mere result of mistake as to legal duties and obligations in the premises.

The said charter granted by the territorial legislature of Kansas did not reserve to the legislature the power of amendment or repeal, and defendant is advised that no power existed to amend or change the same without the consent of the company; that said charter when accepted and acted upon by the company, constituted a contract with the company and its members, which no subsequent act of the legislature of Kansas could impair, and that it is and was beyond the legislative power and competency of the state of Kansas by any legislation subsequent to the granting of the said charter, or subsequent to the acceptance thereof by the company, or subsequent to

the company's acceptance of the act of Congress of July 1, 1862, as herein stated, to impose additional duties upon or to subject the company to forfeiture for newly-created causes, and the defendant says that the legislative acts of the state of Kansas, passed in 1874, requiring railway companies to keep general offices in the state, under penalty of forfeiture of charter (if intended to apply to this defendant, which it denies), is, the same never having been accepted by the defendant, null, void and inoperative, so far, at least, as it attempts to make a failure to comply therewith a ground of forfeiture of the defendant's charter, and the same is likewise null, void and inoperative as in conflict with the said act of Congress of July 1, 1862, and its amendments, and the rights, powers, duties and obligations of this defendant thereunder.

57 And the defendant makes the same allegations in respect of each and all of the other acts of the state of Kansas, for alleged violations of which the petition herein makes complaint, and this defendant claims the benefit and protection of the constitution and laws of the United States in this behalf.

XI. Under the authority given by section 9 of the said act of Congress, July 2d, 1864, and section 1 of the act of Congress of July 3, 1866, this defendant did not build its road to the one hundredth meridian in Nebraska, but built the same continuously through the state or Kansas and into the territory (now and at the date of said consolidation the *state*) of Colorado, to the city of Denver, in said state of Colorado, and under the act of Congress of March 3d, 1869, and pursuant thereto, it connected its lines of road, by means of the Denver Pacific Railway & Telegraph Company, with the road of the Union Pacific Railroad Company at Cheyenne, in Wyoming territory, at or near the state line of Colorado.

Defendant further says that in the construction of so much of its said railroad as lies beyond the state line of Kansas and within the territory of Colorado, defendant was authorized, in and by the acts of Congress hereinbefore referred to, to build, and did build the same as a corporation of the United States; created and authorized thereto by the necessary effect and operation of the acts of Congress as hereinbefore set forth. Nevertheless, if it shall be held that it was not the necessary effect and operation of the said acts of Congress thereby to create and to make this defendant a corporation of the United States, then defendant submits that in the construction and operation of so much of its said railroad as lies within the then territory and now state of Colorado aforesaid, defendant was

58 acting as a corporation of the territory, now state, of Colorado, and was, in fact, within the meaning of said Kansas act of March 1, 1870, a railroad company, duly organized and existing under the laws of the said state of Colorado, whose lines of railroad connected at the state line so as to form one complete and continuous line of railroad with the railroad owned and operated by the defendant as a corporation of the state of Kansas.

Defendant therefore denies that the said line of railway, so con-

solidated as aforesaid, at the date of such consolidation did not connect with the said line of the Kansas Pacific Company at the state line of Kansas, so as to form one complete and continuous line of railroad; denies that the Kansas Pacific Railway Company, prior to such pretended consolidation, operated the Denver Pacific Railway and Telegraph Company's line as a parallel and competing line to the Union Pacific Railroad Company's line, or that said railways, so consolidated as aforesaid, were, and at all times have been, up to the date of said consolidation, parallel and competing lines, as alleged in the said petition; denies that the Union Pacific Railroad Company, at the date of said consolidation, owned or leased a line of railway to the city of Denver.

XII. This defendant, for further answer, admits that since the date of said consolidation it has not designated some person residing in each county into which its railroad runs, or in which its said business is transacted, on whom all process and notices issued by any court of record or justice of the peace of such county may or might be served, and avers that it was and is unnecessary to do so, because at the time of said consolidation parties had been designated by the defendant in various counties of the state upon whom such process might be served, which said designation has never been
59 changed or revoked, and the parties thus designated still hold their appointments at various points along the line of the road.

XIII. For further answer defendant says that all allegations in said petition not herein expressly admitted, are denied, and it asks that the plaintiff be required to make strict proof of the same.

XIV. The defendant annexes to this answer as an exhibit copies of various acts of Congress and of the Kansas legislature, and other official documents pertaining to the Union Pacific and Kansas Pacific railroad companies.

XV. This defendant, though protesting and insisting that the said petition is insufficient, has, nevertheless, fully answered the same, and prays that it may be dismissed and discharged by the court hereof and from the premises aforesaid.

THE KANSAS PACIFIC RAILWAY COMPANY,

By

President.

Attest:

Secretary.

JOHN F. DILLON,
JOHN P. USHER, and
A. L. WILLIAMS,
Attorneys for the said Kansas Pacific Railway Company.

60 THE STATE OF NEW YORK, }
City and county of New York, } *ss.*

Sidney Dillon, being duly sworn, says he is the president of the Kansas Pacific Railway Company which filed the foregoing answer,

he having been the president at the date of said consolidation therein set forth, and no successor having since been elected or qualified; that he knows the contents of said answer, and the facts therein stated are true as he verily believes.

THE STATE OF NEW YORK,
City and county of New York, } *ss.*

I, Edward Canfield, notary public in and for said city, county and state, do hereby certify that the above foregoing answer and verification was signed by the said Sidney Dillon in my presence and sworn to by him before me this day of October, 1883.

Witness my hand and official seal hereto set the date last above written.

[SEAL.]

———— ————,
Notary Public as aforesaid.

61 ACTS OF CONGRESS AND KANSAS LEGISLATURE,
AND OTHER DOCUMENTS, PERTAINING TO THE
UNION PACIFIC AND KANSAS PACIFIC RAILROAD COMPANIES.

Topeka, Kansas: Kansas Publishing House, 1881.

62 APPENDICES.

APPENDIX 1..... KANSAS RAILROAD LAWS.
APPENDIX 2..... ACTS OF CONGRESS.
APPENDIX 3..... CONSOLIDATION.

63, 64 [Blank pages.]

65 APPENDIX 1.

Kansas Railroad Laws,

Including charter of Leavenworth, Pawnee & Western Railroad Company, amendment thereto in 1857, and other laws and resolutions of the state affecting the Kansas Pacific Railroad.

A.

[LAWS OF 1855, P. 915.]

AN ACT to incorporate the Leavenworth, Pawnee & Western Railroad Company.

Be it enacted by the governor and legislative assembly of the territory of Kansas as follows:

SECTION 1. A company is hereby incorporated, called the Leavenworth, Pawnee & Western Railroad Company, the capital stock of which shall be five millions of dollars, to be divided into shares of fifty dollars each; the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make and use a common seal and change and alter the same at pleasure, and shall be able in law and equity to make contracts; may take, hold, use, possess and enjoy the fee-simple or other title in and to any real estate necessary to carry out the provisions of this act, and no more, and may sell, convey, pledge, mortgage or dispose of the same; may make by-laws, rules and regulations proper and necessary for carrying into effect the provisions of this act, not repugnant to the constitution or laws of the United States or of this territory, and shall have the usual and necessary powers of companies for such purposes.

SEC. 2. W. H. Russell, J. Marion Alexander, S. D. Lecompte, Amos Rees, James Davies, W. F. Dyer, Robert Wilson, James Findlay, E. S. Wilhoit, Edward H. Dennis, C. H. Grover, Wilburn Christison, M. P. Rively, Charles Hayes, and Cornelius M. Burgess, or any five of them, shall constitute the first board of directors un-

der this act, and shall hold their office until their successors shall be qualified; they shall, within five years from the date of the passage of this act, meet at such time and place as shall be designated by any three of them, and organize as a board of directors; and when organized, they shall cause books to be opened for subscription to the capital stock of the said company, at such time and
66 place as they may designate, under the supervision of such persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such books when necessary until the whole stock shall be subscribed.

SEC. 3. So soon as three thousand shares shall be subscribed, the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in two or more public newspapers.

SEC. 4. An election for nine directors shall be held on the first Monday in April in each year, and if not held on that day, an election may be held at any other time that the directors shall designate; the election shall be held under the supervision of three or more stockholders, and the persons receiving the highest number of votes shall be elected, and shall continue in office until their successors be qualified; every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy; soon after the election, the directors shall meet and elect one of their number as president, who shall hold his office for the term for which he was elected director, and until his successor shall be qualified.

SEC. 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company, and shall keep a journal of their proceedings, and shall cause correct books and accounts to be kept; they may determine by law what number of directors shall constitute a quorum, may appoint committees, and fill all vacancies in any office under said company; they shall fix the salaries of the president, and the officers and agents; they may take security of their officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

SEC. 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper, and if any stockholder shall fail to pay any such requisitions within ten days after the time appointed, the said company shall recover the same with interest, and if not collected may direct the stock forfeited, and sell the same; and no delinquent stockholder shall vote in said company.

SEC. 7. Said company shall have full power to survey, work, locate and construct a railroad from the west bank of the Missouri river, in the town of Leavenworth, in this territory; and from thence west to the town of Pawnee or to some point feasible and near to the government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the territory, and for
67 the same to the western boundary of the territory, and for that purpose may hold a strip of land not exceeding one hundred feet

in width, with as many set of tracks as the said president and directors may deem necessary: *Provided*, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses and water stations, and may extend branch railroads to any point in any of the counties through which the said road may be located; and said company shall have power to construct a branch road from any point in the main trunk of said road to the town of Kickapoo, on the Missouri river; no discrimination shall be made between the main trunk of said railroad and the branches connecting with the same, in regard to the rates of passage and the charges for freight shipped over the same.

SEC. 8. Said company shall take voluntary relinquishments of the right of way for said road, and the necessary depots and water stations; and if the land through which said road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minors shall have power to convey to said company so much of the land as may be necessary for the purposes aforesaid, on fair and equitable terms, but every such relinquishment shall be subject to the approval or rejection of the probate or other court in which such guardianship is pending. If any owner of any tract of land through which said railroad shall pass shall refuse to relinquish his right of way for said railroad to said company, or the necessary land for depots, engine or wood houses, water station, stopping stages, or turnouts, or if the owners be infants or persons of unsound mind, or non-residents of the territory, the facts of the case shall be especially stated to the judge of the District Court of the county, or presiding judge of the Court of Common Pleas of the county, as the case may be, in which such lands are situated, and said judge shall appoint three disinterested citizens of the county in which said lands are situated to view said lands, who shall take into consideration the value of the land, and the advantages and disadvantages of the road to the same, and shall report under oath what damages will be due to said lands or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned; notice of such application to such judge shall be given to the owner of such land five days before the making of the application, if such owner reside in this territory, or to his guardian; and if such owner be a non-resident of this territory he may be served with actual notice or by an advertisement for four weeks in some public newspaper.

SEC. 9. The persons appointed to view and value such lands shall file their report and plat in the office of the clerk of the District Court or Court of Common Pleas, as the case may be, of the county in which the land or a part thereof is situated; and if no valid
68 objections be made to said report the court shall enter judgment in favor of such owner against such company for the amount of damages assessed, and shall make an order vesting in said company in fee-simple, title of the land in such plat and report described.

Objections to such report must be filed in ten days; after the same shall have been filed, said objections shall be examined by said judge, in term-time or vacation, and he may hear testimony and by judgment confirm said report, or he may set the same aside and appoint three other viewers, who shall proceed in the same manner and make a report until a report is confirmed: *Provided*, In order that the progress of the work may not be impeded, that after said owners have filed their report and plat in the office aforesaid, the company, after having made a tender of the amount of damages to the person or persons entitled to the same, or made a deposit of the amount with the clerk of the court in which the case may be pending, shall be authorized to proceed in the construction of the work as fully as though no disagreement had arisen. In all such cases the court shall adjudge the costs of the proceedings according to equity, and the court shall have power to make such orders and take such other steps as will promote the ends of justice between the owners of such lands and the said company; and the said viewers shall be entitled to the same fees as are allowed to commissioners in partition under the statute.

SEC. 10. Said company may build said road along or across any public road or street or wall of any town or city and over any stream or highway; but whenever said road shall cross any public road, said company shall keep good and sufficient cause-ways or other adequate facilities for crossing the same; and said road shall not be so constructed as to prevent the public from using any road, street or highway along or across which it may pass; and when said railroad shall be built across any navigable stream, said company shall erect a bridge sufficiently high on which to cross, or shall construct a drawbridge, so that in no case shall the free navigation of such stream be obstructed. When any person shall own lands on both sides of said road, said company, when required so to do, shall make and keep in good repair one causeway or other adequate means of crossing the same.

SEC. 11. Said company shall commence the construction of said road within five years and shall complete the same within twelve years thereafter; and said company shall have general power to use, manage, control and enjoy said road; shall determine what kind of carriages shall be used thereon, and by whom or in what manner; and shall determine the terms, condition and manner in which merchandise, property and passengers shall be transported; and shall have power to construct and keep such turn-outs, gates, culverts, toll-houses, depots, warehouses, causeways and other buildings, machinery and fixtures as may be necessary. Said company may receive such tolls and freights as may be determined upon by
69 the directors, and shall keep posted up in their depots estimates of the rates of tolls and freight charged.

SEC. 12. Dividends of so much of the profits of said company as shall appear advisable to the directors shall be declared semi-annually, and be paid to the stockholders or their legal

representatives, on application at the office of said company, at any time after the expiration of ten days from the time of declaring the same; but the dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby; and if the said directors shall make any dividend which shall impair the capital stock of the company, the directors consenting thereto shall be liable in their individual capacities to the company for the amount of capital stock so divided; and each director present when such dividend shall be declared shall be considered as consenting thereto, unless he immediately enter his protest on the minutes of the board and give public notice to the stockholders of the declaring of such dividends.

SEC. 13. At every annual meeting of said company the directors shall make to the stockholders an exhibit of the affairs and condition of the company; one-tenth part in interest of all the stockholders may call a meeting by giving four weeks' notice in two public newspapers.

SEC. 14. When said road shall be completed, the company shall file a plat thereof in the office of the secretary of the territory, or of the state or states, as the case may be, and the legislature may at any time require a statement from the company as to the progress of the work, the amount of business and the receipts of the company; and the books and accounts of said company may at any time be investigated by a committee appointed by the general assembly; and the said corporation shall make an annual report to the secretary of the territory, or of the state or states, as the case may be, of the operations of the year ending on the first day of December, which report shall be verified by the oaths of the treasurer and acting superintendent of operations, and filed in the office of the secretary of the territory, or of the state or states, as the case may be, by the third Monday in December, in each year, and shall state: *first*, the capital stock and the amount actually paid in; *second*, the amount expended for the purchase of land for the construction of the road, for buildings, and for engines and cars, respectively; *third*, the amount and nature of its indebtedness and the amount due the corporation; *fourth*, the amount received for the transportation of passengers, of mails, of property, and from all other sources; *fifth*, the amount of freight (specifying the quantity in tons) of the products of the forest, of animals, of vegetable food, other agricultural products, manufactures, merchandise, and other articles; *sixth*, the amount paid out for repairs; *seventh*, the number and amount of dividends and when made; *eighth*, the number of engine houses and shops, of engines and cars and their character; *ninth*, the number of miles run by passenger, freight and other trains, respectively; *tenth*, the number of men employed and their occupations; *eleventh*, the number of persons injured in life or limb, and the cause of such injuries; *twelfth*, whether any accidents have arisen from carelessness or negligence of any person in the employment of the corporation, and whether such person is retained in the service of the corporation.

SEC. 15. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any incorporated city, town, or incorporated company may subscribe to the stock of said company and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of such city, town or corporation.

SEC. 16. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the state or states through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued by persons to be mutually chosen by the state and by said company; but two years' notice shall be given to said company of the intention of the state to purchase said railroad.

SEC. 17. When any person ceases to be a stockholder he shall cease to be a member of said company.

SEC. 18. If any person shall wilfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixtures or improvement belonging to said company, he shall be considered guilty of a criminal offense and shall be punished in such manner as shall be prescribed by law; and shall also be liable to said company for all damages by it sustained.

SEC. 19. The operations of said company shall be confined to the general business of locating, constructing, making and using said railroad, and the acts necessary or proper to carry the same into complete and successful operation.

SEC. 20. The stock of said company shall be considered personal property, and shall be assignable and transferable according to such rules and restrictions as the board of directors shall from time to time make and establish, subject, however, to the laws of the territory or any future state erected out of this territory, as the same may
71 be made. In case that it shall happen at any time that an election of directors shall not be made on any day when pursuant to this act or any regulations of said company it ought to have been made, the said corporation shall not for that cause be deemed dissolved; but it shall and may be lawful on any other day to make and hold an election of directors in such manner as shall be regulated by the by-laws and ordinances of the company.

SEC. 21. Said company shall have power to receive and hold loans, gifts, grants, and donations of land, money or bonds in any quantity from this territory, or from any future state erected out of this territory, or the United States; and may sell, convey, pledge, mortgage or otherwise dispose of said land, moneys or bonds, or any part

thereof, and apply the proceeds of the same to the construction of said railroad.

This act to take effect and be in force from and after its passage.

B.

[PRIVATE LAWS OF KANSAS TERRITORY, 1857, PAGE 218.]

AN ACT supplemental to an act entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company."

Be it enacted by the governor and legislative assembly of the territory of Kansas as follows:

SECTION 1. The provisions of an act entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company," shall be and the same are hereby so extended as to enable said company to commence and progress with, at any time with nine years from the date of the passage of this act, the construction of a railroad, to be called the "Southern Branch and Gulf Railroad," beginning at some favorable point on the Leavenworth, Pawnee & Western Railroad, and following the most practicable route southwardly, to terminate on the southern boundary of the territory of Kansas, at some point where an easy connection may be had with a line of railroad extending through the Indian territory and state of Texas to the gulf of Mexico, under the same provisions, privileges, rights and restrictions as provided in the act to which this act is a supplement; and for said purpose the said company may increase their capital stock to ten millions of dollars, or any other amount necessary for the completion of the said road.

SEC. 2. The said company shall have, hold and enjoy the
72 free right and privilege of keeping and maintaining a public ferry across the Missouri river, at the point or terminus of said road on said river; and also across other streams on the line of said road, where the said company may deem such ferry preferable to a bridge, or until such time as said company can procure bridges.

SEC. 3. The said company shall have power and authority at any time within nine years from the passage of this act, to commence and continue the construction of a branch or branches of said road from any point on said road to any point on the southern or western boundary of the territory; and also to construct a branch from any point on the said road to any point on the northern boundary of the territory of Kansas, with all the privileges, powers and rights granted to said company by the act to which this is a supplement, and subject to all the restrictions and provisions of said act.

This act to take effect and be in force from and after its passage.

Approved February 23, 1857.

C.

[LAWS OF KANSAS, 1861, P. 237, CHAP. 52.]

AN ACT relating to railroad companies whose charters have not been declared forfeited.

Be it enacted by the legislature of the state of Kansas:

SECTION 1. That it shall be lawful for all railroad companies whose

charters have not been declared forfeited, to hold, by grant or otherwise, from any source whatever, any real or personal estate, and to sell, dispose of, convey, and encumber, all or any part to which such corporations may acquire title, by grant or otherwise, for the purpose of securing or aiding the construction of said roads, and that the period of two years is hereby given to all such companies to commence the actual construction of their respective roads.

SEC. 2. This act shall take effect and be in force from and after its publication in some newspaper published in Topeka.

I hereby certify that the above bill became a law by publication in the Topeka *State Record*, June 24, 1861.

J. W. ROBINSON,
Secretary of State.

73 D.

[COMPILED LAWS OF KANSAS OF 1862, P. 767.]

AN ACT relating to railroad companies.

Be it enacted by the legislature of the state of Kansas:

SECTION 1. Any railroad company now organized or which shall hereafter organize under the laws of Kansas, may, at any meeting regularly called of all the stockholders thereof, by vote of persons holding a majority of the stock of such company, unite or consolidate it with any other company or companies now organized or which may be hereafter organized under laws of the United States, or of any state or territory, by the consent of the company with which it may so consolidate and unite, and such company or companies with which it shall so unite or consolidate, may hold, use and enjoy all the rights and privileges conferred by the laws of Kansas on the company or companies so uniting or consolidating with it, and shall be liable for all the debts and own all the property and franchises of such company or companies: *Provided*, That any companies thus united for the purpose of the construction of a railroad and branches thereof from the western boundary of the state of Missouri to the Pacific ocean, shall, upon equal terms, have the right to run through cars upon said Pacific Railroad as far and as fast as the same is completed from the points on the Missouri river from which said roads or branches shall start, or where such road or branches shall cross said river; and that such roads or branches shall have the right to connect with said Pacific Railroad at such points as may be determined by the respective roads or branches; and that such roads or branches shall share equally in the proceeds of any public lands which may be hereafter ceded or granted by any treaty with any Indian tribe, or by any act of Congress to aid in the construction of any or all such roads. But this amendment shall not apply to the lands already ceded by the Pottawatomie Indians by a treaty now pending in the United States senate. Such proceeds to be applied in proportion to the length of the line of each road fom the respective points on the Missouri river, where such roads shall

start or cross the same, to the points of connection; and that such branches shall have the right to transport passengers and freight upon through cars, or otherwise, upon equal terms, and to enjoy equal facilities in respect to contracts for freight or passage on such Pacific Railroad in every respect.

SEC. 2. Any railroad now organized, or which may hereafter organize under the laws of the state or territory of Kansas, shall have the right to construct and operate along its proposed route a line of telegraph, as soon as the work of construction of such road shall have been commenced, with all the rights, privileges and franchises given to any telegraph company under any law of the state or the territory of Kansas.

74 SEC. 3. Any such railroad company, by vote of persons owning a majority of its stock, at any meeting regularly called of all the stockholders of such company, may change its corporate name or the number of its directors at pleasure; and may, in like manner, make valid and effectual any acts done in good faith, and may cause to be done any acts omitted, affecting the organization or affairs of such company, or the continuance of its charter, though such acts may have been done or omitted contrary to the regulations of such company or the requirements of law: *Provided*, The time given by law to such railroad company, within which to commence the construction of its road, shall not be hereby extended.

SEC. 4. Any railroad company, now organized under the laws of the state or territory of Kansas, may extend their road, and construct the same still further in the same general direction, under the same restrictions now embodied in their charters, and may increase their capital at the rate of $15,000 per mile, for every mile so constructed.

SEC. 5. Any railroad company, now organized under the laws of the state or territory of Kansas, may receive subscriptions to the capital stock of their road in lands, lots, houses, or any personal property, at such valuation as may be agreed upon with the party or parties; and the company may sell, mortgage, or pledge such real or personal property to raise money or materials for construction, equipping, or operating said road.

SEC. 6. For the purpose of enabling any company to construct, equip, and operate their road, they are hereby authorized to pledge or mortgage said road, rolling stock, machinery, depots, and any other property they possess, together with the franchise of said road, for the liquidation of any indebtedness said railroad company may incur in the construction of said road.

SEC. 7. All deeds for the conveyance of real estate of said company shall be signed by the president of said company, and attested by the secretary, with the corporate seal attached, which shall be deemed and held as sufficient execution, authentication and acknowledgment of such deeds in all courts.

SEC. 8. This act shall take effect and be in force from and after

its publication; and the secretary of state is directed to cause it to be published immediately after its passage.

I hereby certify that the above bill originated in the house, on the 25th day of February, A. D. 1862, and passed that body on the 4th day of March, A. D. 1862.

JAMES McGREW,
Speaker pro tem. House of Representatives.
JOHN FRANCIS,
Chief Clerk House of Representatives.

75 Passed the Senate March 4, 1862.

A. R. BANKS,
Secretary.
J. P. ROOT,
President of the Senate.

Approved March 5, 1862.

C. ROBINSON.

I hereby certify that the above is a true copy of the original enrolled bill now on file in my office.

J. W. ROBINSON,
Secretary of State.

E.

[LAWS OF 1859, P. 90; APPROVED FEBRUARY 11, 1859.]
Code Civil Procedure.

SEC. 56. An action against a railroad company, or an owner of a line of mail stages or other coaches, for any injury to persons or property upon the road or line, or upon a liability as a carrier, may be brought in any county through or into which said road or line passes.

F.

[LAWS OF 1855, P. 209.]

SEC. 27. That the county of Leavenworth shall be bounded as follows: Beginning at a point on the southern boundary of Atchison county, due north of a point four miles west of Dawson's crossing of the Fort Riley road, on Stranger creek; thence due south to the main channel of Kansas river; thence down said channel to where said channel crosses the channel of the Missouri river; thence up said channel of the Missouri river to the southeast corner of Atchison county; thence along the southern boundary of said Atchison county to the place of beginning.

[LAWS OF 1857, P. 43; APPROVED FEBRUARY 20, 1857.]

SEC. 27. The county of Leavenworth shall be bounded as follows: Beginning at the southeast corner of Atchison county; thence west

with the south boundary of Atchison county to the corner to sections 21, 22, 27 and 28, of township 7, south of range 20, east; thence south with the section lines between the third and fourth tiers of sections to the main channel of the Kansas river; thence down said Kansas river, in the middle of the main channel thereof, to the intersection of the middle of the main channel of the Missouri river; thence up said Missouri river, in the middle of the main channel thereof, to the place of beginning.

76 G.

[LAWS OF 1859, P. 362; APPROVED JAN. 29, 1859.]

AN ACT creating and organizing the county of Wyandotte.

Be it enacted by the Governor and Legislative Assembly of the territory of Kansas:

SECTION 1. That a county to be called Wyandotte, be hereby erected, including that portion of Leavenworth and Johnson counties lying within the following limits: Commencing at a point in the middle of the channel of the Missouri river, where the north line of the Delaware reserve intersects the same; running thence west on said reserve line, to the line between ranges twenty-two and twenty-three; thence south on said range line to the south boundary line of Leavenworth county; thence easterly on said boundary to the middle of the main channel of the Missouri river; thence northwesterly with said main channel to the place of beginning; also that portion of Johnson county lying north of the township line between townships eleven and twelve, east, of range twenty-three.

H.

[LAWS OF KANSAS, 1859, P. 544, CHAP. 89.]

AN ACT repealing certain laws.

Be it enacted by the Governor and Legislative Assembly of the territory of Kansas:

SECTION 1. All laws of the territorial legislature passed previous to the first day of January, A. D. 1857, are hereby repealed.

SEC. 6. This act shall not be construed to affect or interfere with vested rights, but such rights shall be and remain as secure as if this act had never been passed.

A. LARZELERE,
Speaker of the House of Representatives.
C. W. BABCOCK,
President of the Council.

Approved February 11, 1859.

S. MEDARY,
Governor.

77

I.

[LAWS OF KANSAS, 1861, P. 238, CHAP. 53.]

An Act to change the name of the Leavenworth, Pawnee & Western Railroad Company.

Be it enacted by the legislature of the state of Kansas:

SECTION 1. That the name of the Leavenworth, Pawnee & Western Railroad Company be and is hereby changed to the Leavenworth, Fort Riley & Western Railroad Company.

This act shall take effect and be in force on and after its passage. Approved June 4, 1861.

J.

[EXTRCT FROM LAWS OF KANSAS, 1865, P. 101.]

SEC. 22. Any railroad company in this state, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this state, into single corporation, in the manner following: First, any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the names and places of residence and number of the directors thereof, which shall not exceed nineteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, which will not be less than one hundred dollars, the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporations, the manner of compensating stockholders in each of said two or more corporations who refuse to convert their stock into the stock of such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this act.

78

K.

[EXTRACT FROM SECTION 1, of "An act to provide for the consolidation and extension of railroads in the state of Kansas," approved March 1, 1870. Laws of Kansas of 1870, p. 195.]

Be it enacted by the legislature of the state of Kansas:

SECTION 1. Any two or more railroad companies in this state existing under general or special laws, and owning railroads constructed wholly or in part, which when completed and connected will form a continuous line or lines of railroad, and any railroad company organized as aforesaid, and any railroad company duly organized and

existing under the laws of an adjoining state, whose lines of railroad shall connect at the state line so as to form when completed a continuous line of railroad, are hereby authorized to consolidate and form one company owning and controlling such continuous line or lines of railroad, with all the rights, powers, privileges, and immunities, and subject to all the obligations and liabilities to the state, which belong to or vested upon either of the companies making such consolidation. * * *

L.

[CONCURRENT RESOLUTIONS OF THE KANSAS LEGISLATURE.]

March 17, 1862—Referred to the Committee on Indians Affairs, and ordered to be printed.

CONCURRENT RESOLUTIONS memorializing Congress to pass an act to aid in completing a railroad from the Missouri river to the Pacific ocean.

Resolved by the House of Representatives of the State of Kansas, the Senate concurring therein, That the Congress of the United States be and is hereby urgently requested to pass an act to secure the early completion of a railroad from the Missouri river to the Pacific ocean by way of Fort Riley, as is more fully set forth in bill No. 262, introduced on the fifth day of February, 1862, into the United States house of representatives, by the Hon. J. S. Rollins.

And whereas, The ratification of the treaty lately concluded between the United States and the Pottawatomie Indian nation is indispensable to the construction of said railroad; therefore, be it

Resolved further, That the senate of the United States is urgently requested to ratify said treaty as soon as may be.

Resolved further, That our senators in Congress be instructed and our representatives requested to use every exertion to secure the objects sought in the foregoing resolutions; and be it

Resolved, further, That the governor of the state of Kansas
79 is hereby requested to transmit to our senators and representative in Congress certified copies of the foregoing resolutions, with the request that they immediately lay claim before Congress.

HOUSE OF REPRESENTATIVES, *March* 5, 1862.

The accompanying resolution, No. 14, "Memorializing Congress to pass an act to aid in completing a railroad from the Missouri river to the Pacific ocean," has been adopted by the Senate and House of Representatives.

Final passage, March 4.

Yours respectfully, JOHN FRANCIS,
Chief Clerk.

His Excellency Gov. CHARLES ROBINSON.

I certify the within preamble and resolutions are a correct copy of the original as on file in this office.

HENRY O. SHOLES,
Private Secretary to his Excellency the Governor.

M.

[CERTIFIED EXTRACT FROM THE ROLLINS BILL.]

SECTION 11. *And be it further enacted*, That any other railroad company now incorporated or hereafter to be incorporated may unite with the People's Pacific Railroad Company in constructing their said railroad and telegraph line, or any part thereof, by filing their assent to this act as aforesaid, at any time before the same are constructed, upon such terms as may be equitable, to be agreed upon or determined in the manner hereinafter provided. And when any of the lands granted as aforesaid shall be worthless, other lands may be selected in lieu thereof, under the direction of the secretary of the interior, and as near as may be to the line of said roads; and for five hundred miles of said road most mountainous and difficult of construction—three hundred from the foot of the mountains west of Denver city, and two hundred directly adjoining the state of California—the amount of lands to be granted and bonds to be issued to aid in the construction thereof shall be double the amount per mile hereinbefore provided, and may be called for upon the construction of every twenty-five miles thereof; and between the two last-named sections said company shall be entitled to receive such double amount of lands and three-fourths such double amount of bonds as fast as each twenty-five miles are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the said line of railroad and telegraph from Fort Leavenworth to San Francisco.

80 SEC. 15. *And be it further enacted*, That at any time after the passage of this act, all of the railroad companies named therein and assenting thereto, upon an application of any two of them, are authorized to form themselves into one consolidated company, upon such terms as may be just and equitable between them, to be agreed upon or determined as hereinbefore provided. And such consolidated company may thereafter proceed to construct said railroad and telegraph line upon the terms and conditions provided in this act, and in conformity with the charters of said companies in the states of Kansas and California, respectively, so far as the line of said road is situated within said states. The charges and rates of fare upon said railroad shall be fair and reasonable in amount, and shall be uniform, or as nearly so as may be, upon the whole line thereof.

I hereby certify that the foregoing is a full, true, and exact copy of sections eleven and fifteen of the bill, H. R. No. 262, introduced on the 5th of February, 1862, by Hon. J. S. Rollins, entitled "An act to aid in constructing a railroad and telegraph line from the Missouri river to the Pacific ocean," etc.

GREEN ADAMS,

[SEAL.] *Chief Clerk House of Representatives.*

N.

Whereas, Congress at the session of 1861 and 1862 passed an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, which act was approved July 1, 1862; and, whereas, section nine of said act provided that the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri to a point on the 100th meridian of longitude, between the Platte and Republican rivers; and, whereas, it appears from the debates on the passage of said act that the principal cities and towns in the Kansas valley were to be points in said road; and, whereas, the assignees of the Leavenworth, Pawnee & Western Railroad Company, represented by Samuel Hallett & Co., have not commenced said road on the Missouri river at the mouth of the Kansas, but at a point on the Kansas river above Wyandotte; and, whereas, said company so represented has surveyed and located said road to a point three miles north of Lawrence, the largest city in the Kansas valley,
and are surveying said road north of Topeka, the capital of
81 Kansas, and are thus avoiding our cities, towns and business
centers, to the great injury of the people of the state as well as the Kansas valley; and, whereas, said company so represented are now demanding that the people of Wyandotte shall pay one hundred thousand dollars to make that city a point in said road; and, whereas, said company so represented are demanding a like sum from the people of Lawrence on condition of being a point in said road; and, whereas, a like sum is demanded from the citizens of Topeka, the capital of our state, to secure it as a point in said road; and, whereas, we have good cause to believe that the same policy will be pursued as the road progresses west, and that the said Samuel Hallett & Co. demand large sums of money and bonds from the people of cities and towns along the route of said road to build this road just where Congress intended it should be built; and this after Congress has placed in the hands of the company means sufficient to build the entire road: therefore,

Resolved 1*st*, *By the House of Representatives, the Senate concurring therein*, That Congress be earnestly requested to amend the act above referred to, so as to require the Leavenworth, Pawnee & Western Railroad Company, or their assigns, to make Wyandotte, Lawrence, Topeka, Wabaunsee, Manhattan and Junction City points on said road.

Resolved, 2*d*, That the President of the United States be respectfully urged to withhold his approval of the location of said road unless Wyandotte, Lawrence, Topeka, Wabaunsee, Manhattan and Junction City are made points in said road: *Provided*, That nothing in this resolution shall be construed or understood to affect the original act of the territory of Kansas, entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company," or to affect

the location of the road commencing in Leavenworth, provided for in said act.

Resolved, 3d, That our senators be and are hereby instructed and our representatives requested to use every honorable means to secure the above proposed amendments to said location.

Resolved, 4th, That the secretary of state be directed to send an official copy of this preamble and resolutions to each of our senators and representative in Congress, to the President of the United States, also to the president of the senate and speaker of the house of representatives, with a request to present the same to their respective bodies.

Adopted by the house and senate amendments concurred in March 1, 1864.

ALEX. R. BANKS,
Chief Clerk.

Concurred in by the senate on the 18th day of March, A. D. 1864.

JOHN T. MORTON,
Secretary of Senate.

I, R. A. Barker, secretary of state, do hereby certify that the foregoing is a true and correct copy of the original concurrent resolution on file in this office.

[SEAL.]

R. A. BARKER,
Secretary of State.

82 O.

WHEREAS, The aid heretofore granted by Congress at the instance of the state for the extension of the Union Pacific Railway Company, eastern division, is sufficient to enable the company to construct said road to its junction with the line from Omaha as rapidly as the interests of the state and the nation require; and whereas the amount of government service performed, and the income of the portion of the road already completed affords a reasonable guarantee that further aid may be safely granted, without the probability of loss to the United States: therefore, be it

1*st. Resolved by the House of Representatives of the State of Kansas, the Senate concurring therein,* That the matters aforesaid be respectfully presented to Congress with the urgent request that further aid be granted to the said railway company, upon such terms and conditions as will secure the government against loss and assure the speedy construction of said railway to its junction with the line from Omaha.

2*d.* That our senators in Congress are instructed and our representative requested to use every exertion to secure the object sought in the foregoing resolution.

Adopted by the house of representatives Feb. 1, 1867.

JOHN T. MORTON,
Chief Clerk.

Concurred in by the senate February 9, 1867.

A. R. BANKS,
Secretary.

I, R. A. Barker, secretary of state, do hereby certify that the foregoing is a true and correct copy of the original concurrent resolution on file in this office.

In testimony whereof, I have subscribed my name and affixed the great seal of the state, this 28th day of May, 1868.

[SEAL.] R. A. BARKER,
Secretary of State.

P.

WHEREAS, The extension of the Union Pacific Railway, eastern division, through the territories of New Mexico and Arizona and making a connection by way of Denver city with the northern road from Omaha, is demanded by an enlightened public sentiment, a just regard to population, representation and territory; the speedy, economical and permanent settlement of our Indian difficulties; the rapid development of the richest material regions; the reduction of the large appropriations now necessary to the maintenance of our forts and the efficiency of our military service on the plains; the
83 continuance and preservation of our existing friendly relations with our neighboring sister republic, and the unity and indivisibility of our own people: therefore,

Be it resolved by the Senate of the State of Kansas, the House of Representatives concurring therein, That the extension of the eastern division of the Union Pacific Railway to the Pacific coast along the central route, which recent surveys have shown eminently practicable, is alike demanded by the necessity of our national progress, sound public policy, and justice to all parts of the Union, and that to this end the same subsidy in lands and bonds should be granted to this road as has already been given to the line from Omaha.

Resolved, further, That in view of the present subsidy on the line of the "eastern division" expiring upon the completion of some additional fifty miles west of the present termini, that our senators in Congress be instructed and our representatives requested, at the earliest practical period to respectfully and earnestly present this important (especially to the people of Kansas,) subject to the Congress of the United States, so as to procure such legislation as is necessary to the successful prosecution of this great central railway to the Pacific.

Resolved, That certified copies hereof be at once forwarded to each of our senators, to our representative, and to the president of the senate and speaker of the house ef representatives of the Congress of the United States.

Adopted by the senate Jan. 27, 1868.

E. C. MANNING,
Secretary of Senate.

Concurred in by the house of representatives February 7, 1868.

JOHN T. MORTON,
Chief Clerk.

I, R. A. Barker, secretary of state, do hereby certify that the foregoing is a true and correct copy of the original concurrent resolution on file in this office.

In testimony whereof, I have subscribed my name and affixed the great seal of the state, this 28th day of May, 1868.

[SEAL.] R. A. BARKER,
Secretary of State.

Q.

Whereas, by the act of Congress passed July 1st, 1862, providing for the construction of a main line of railroad and telegraph from the 100th meridian of west longitude to the Pacific ocean, with branches to connect therewith from St. Joseph, Wyandotte, and Sioux City, and by the several acts amendatory thereto passed July 2d, 1864, July 3d, 1866, and March 3d, 1869, it is expressly
84 stipulated and provided "that the said main line of road, together with the several branches," shall be required to operate and use the said roads and telegraph for all purposes of communication, travel, and transportation, as far as the public and government are concerned, as one *continuous* line, and in such operations and use to afford and secure to each equal advantages and facilities as to *rates*, *time*, and *transportation*, without any *discrimination* of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others; and whereas, by the act of March 3d, 1869, the Kansas Pacific Railroad, formerly known as the Union Pacific Railway, eastern division, was required to make its connection with the said main line of the Union Pacific Railway at Cheyenne, and was authorized to contract with the Denver Pacific Railway Company to construct and operate that part of the line between Denver and Cheyenne; and as section two (2) of the act above referred to expressly provides and stipulates "that all provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, eastern division;" and whereas the said main line "Union Pacific Railway Company," in open violation of the aforementioned acts of Congress, has continuously and persistently refused to recognize the said "Kansas Pacific," formerly Union Pacific Railway Company, eastern division, as one of the branches contemplated in the said acts of Congress, and has by unjust and arbitrary discriminations in the transportation of freight and passengers, prevented this branch of the main line from receiving its legitimate portion of the travel and freight, and by so doing crippling the financial standing and condition and seriously impairing the resources of

the said Kansas Pacific, formerly "Union Pacific Railway, eastern division," compelling them to discriminate against the citizens of the state of Kansas by enhancing the rates of passenger and freight traffic on account of having to support a continuous line of 745 miles of completed railway from the receipts and earnings of about 300 miles of paying road: therefore,

Be it resolved by the senate, the house concurring therein:

SECTION 1. That the Union Pacific Railroad Company, by its continued and persistent violation of law in its refusal to recognize the Kansas Pacific, formerly the Union Pacific Railway, eastern division, as one of the branches contemplated in the original act of July, 1862, and the subsequent amendments thereto, and by its further refusal to grant unto the said Kansas Pacific or Union Pacific Railway, eastern division, all the privileges, immunities, and benefits as provided for, has not only injured the business of that road, but seriously retarded and injured the commercial and agricultural interests
85 of the state of Kansas by compelling said road to advance their rates of transportation of freight and passengers within the state on account of its being cut off from its legitimate portion of through business.

SEC. 2. That we earnestly request the Congress of the United States to take such measures as will at an early day compel the Union Pacific Railway Company to afford the same facilities for the transportation of freight and passengers, both in regard to rate, time, and transportation, as is contemplated by law, without discrimination or injury to the said Kansas Pacific, formerly Union Pacific Railway, eastern division.

SEC. 3. *And be it further resolved,* That our senators be instructed and our members of Congress requested to bring this matter before the Congress of the United States at the earliest practicable moment, and that they urge an immediate investigation into the facts of the case, in order that such unjust discriminations shall cease and the conditions of the law fulfilled.

SEC. 4. The secretary of state is hereby directed to furnish each of our senators and members of Congress with a copy of the foregoing resolutions, and a copy each to the president of the senate of the United States and the speaker of the house of representatives.

I certify that the above and foregoing resolutions passed the senate on February 3d, 1874.

THOS. H. CAVANAUGH,
Secretary.

Concurred in by the house of representatives Feb. 7th, 1874.

BANKS,
Chief Clerk.

STATE OF KANSAS, } ss.
Office of Secretary of State, }

I, James Smith, secretary of state of the state of Kansas, do hereby certify that the foregoing is a true and correct copy of the original resolution on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed my official seal. Done at Topeka, this 16th day of February, A. D. 1881.

[SEAL.]

JAMES SMITH,
Secretary of State.

R.

[COPY OF LETTER OF HON. THOS. EWING, then chief justice of Kansas, to the senate committee of Indian affairs, submitting the foregoing laws and resolutions to date of letter.]

WASHINGTON, *June* 14, 1862.

Within are the charters of the Leavenworth, Pawnee & Western Railroad Company of Kansas, together with all the laws of the
86 state now in force applicable to that company, or affecting its rights, duties, or liabilities. They have been compiled by me from the Kansas statutes, and are published at the suggestion of several members of the senate, who wish to examine them when considering the Pacific Railroad bill, now pending in that body, which proposes to intrust the construction of the road through the state of Kansas (except the St. Joseph branch) to this company. All the laws of the state, including those herein presented, can be found in the library of the Supreme Court, the libraries of the several departments, and in the room of the select committee of the senate on the Pacific Railroad, except the laws of 1862, which have as yet been published only in the official newspaper of the state, at Topeka. Copies of the newspaper from which the "act relating to railroad companies" (see p. 17) is taken, will be found in the above-named committee-room.

In connection with these laws are published concurrent resolutions of the legislature of the state of Kansas, which passed both branches with almost entire unanimity, memorializing Congress to pass the Pacific Railroad bill, introduced in the house by Hon. J. S. Rollins, on the 5th February, 1862, being house bill No. 262. That bill proposed to give the construction of the Pacific Railroad through Kansas to the Leavenworth, Pawnee & Western Railroad Company, as provided for in the house bill now pending in the senate. And as the Rollins bill was published by order of the lower branch of the Kansas legislature, and examined and discussed with care, before the concurrent resolutions were adopted, these resolutions may be regarded as a distinct expression of the wish of the people of the state that the construction of the main line through it may be given by Congress to the above-named company.

The original charter (see p. 9) provides for the construction of the road from Leavenworth to the western boundary of the (then) terri-

tory, which was on the summit of the Rocky mountains. If there should be any doubt of the power under that act to build to the northern boundary of the state, there can be none as to the power under the supplemental charter of 1857. (See p. 16.)

The power to build from the main line, as designated in the original charter, to the mouth of the Kansas river, is given in sec. 7, (see p. 9,) because Leavenworth county (in which is and has been the town of Leavenworth) included the mouth of the Kansas river when the charters were granted and the road located through the county. (See p. 21.) A like power is also given in section third of the supplemental charter. (See p. 16.) And under the act of March 5th, 1862, (p. 17,) any railroad company may build branches to any part of the state by consolidation with one of the very numerous companies organized under general or special laws; scarcely any of which, it is true, except the company in question, is in active
87 existence, but their several charters are yet available, as none of them have been declared forfeited. (See p. 17, sec. 1.)

The power to build and operate for public business a line of telegraph is given (p. 19, sec. 2).

The power to mortgage the franchises, as well as other property (p. 19, sec. 6).

In section 7, p. 9, the right of way the company may hold was limited to one hundred feet; but the limitation has been removed, so as to allow it to hold a wider strip by grant (p. 17, sec. 1).

Attention is specially called to the curative statutes. (Sec. 3, p. 19, and sec. 1, p. 17.)

It may be proper to remark that the first section of the "act repealing certain laws" is presented herein (p. 22), not because it has any relation to the subject, but merely to avoid any charge of attempting to conceal its existence. The sixth section of the same act, which is also published herein (p. 22), and the repeated laws and resolutions of the legislatures of the territory and of the state, show that those bodies have always been friendly to this company and had never the disposition to disturb it. Almost all the private corporations in Kansas now in active operation derive their origin and most of their powers from early territorial charters, and have been fostered and encouraged by later territorial and state legislation.

The reason which induced the publication herein of the section of the law last referred to, leads also to the publication of the law of June 4, 1861, (p. 23,) to change the name of the "Leavenworth, Pawnee & Western Railroad Company" to the "Leavenworth, Fort Riley & Western Railroad Company." It is only necessary to remark in regard to this law, that it has never been accepted by the company, directly or by implication. The town of Pawnee having gone out of existence, an attempt was made, but not at the suggestion of the company, to substitute "Fort Riley" for it. It is hardly necessary to say that the charter of the company could not be amended in this any more than in any more important provision, without the assent of the company.

The company was organized in January, 1857, at Leavenworth, by subscription of $156,700 of stock, and the choice by the stockholders of a board of directors and other officers. Since then other subscriptions of stock, within the limits of the charter, have been made, new directors and officers at various times chosen, and the company, pursuant to the provisions of its charter, kept in constant and efficient existence.

The construction of the road was commenced in May, 1857, and in that year surveys and profiles of the main line were made, and the location completed from Leavenworth to Fort Riley, under direction of Mr. Edward L. Berthoud. In November last final estimates and adjustments of the line were commenced by Col. Sylves-
88 ter Medbury, of Columbus, Ohio, an engineer of known ability and experience, and are now being continued from Leavenworth to Fort Riley.

The right of way and depot grounds for nearly that length of the line have been obtained—the right through the reservations of the Delaware Indians having been secured by the 12th article of the treaty of 1854 and the 3d article of the treaty of 1860, and the right through the reservations of the Pottawatomie Indians having been expressly granted by the 5th article of the treaty of 1862; and if the bill now pending should become a law, the company can enter at once and vigorously on the construction of the road.

I have been connected with the company, as stockholder and officer, from its organization to this time, and know the above statements are true.

THOMAS EWING, JR.,
A Director of the L., P. & W. R. R. Company.

89 APPENDIX 2.

Acts of Congress Relating to the Pacific Railroads.

Laws of the United States relating to the Union Pacific Railroad and branches, for the construction of which subsidy bonds have been loaned by the United States to the respective companies owning the same.

A.

Pacific Railroad Acts.

[ACT OF 1862.]

AN ACT to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Walter S. Burgess, William P. Blodgett, Benjamin H. Cheever, Charles Fosdick Fletcher, of Rhode Island; Augustus Brewster, Henry P. Haven, Cornelius S. Bushnell, Henry Hammond, of Connecticut; Isaac Sher-

man, Dean Richmond, Royal Phelps, William H. Ferry, Henry A. Paddock, Lewis J. Stancliff, Charles A. Secor, Samuel R. Campbell, Alfred E. Tilton, John Anderson, Azariah Boody, John S. Kennedy, H. Carver, Joseph Field, Benjamin F. Camp, Orville W. Childs, Alexander J. Bergen, Ben Holliday, D. N. Barney, S. De Witt Bloodgood, William H. Grant, Thos. W. Olcott, Samuel B. Ruggles, James B. Wilson, of New York; Ephraim Marsh, Charles M. Harker, of New Jersey; John Edgar Thompson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morrell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, jr., of Pennsylvania; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickensderfer, of Ohio; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O. Mills, Samuel Bell, Louis McLane, George W. Mowe, Charles McLaughlin, Timothy Dame, John R. Robinson, of California; John Atchinson and John D. Winters, of the territory of Nevada; John D. Campbell, R. N. Rice, Charles A. Trowbridge, and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan; William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook, Samuel Q. Curtis, Lewis A. Thomas, Platt Smith, of Iowa; William B. Ogden, Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell, and Lorenzo Bull, of Illinois; William H. Swift, Samuel T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts; Franklin Gorin, Laban J. Bradford, and John T. Levis, of Kentucky; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keys, Thomas A. Canfield, of Vermont; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon; William Bunn, jr., John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Brodhead, A. H. Virgin, of Wisconsin; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, John Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana; Thomas Swan, Channey Crooks, Edward Wilkins, of Maryland; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challis, Josiah Miller, of Kansas; Gilbert C. Monell and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska; John Evans, of Colorado; together with five commissioners to be appointed by the secretary of the interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic in

deed and in law, by the name, style, and title of "The Union Pacific Railroad Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, to the western boundary of Nevada territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital
91 stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the secretary of the interior, are hereby constituted and appointed commissioners, and such body shall be called the board of commissioners of the Union Pacific Railroad and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the postoffice at Chicago, post paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and Saint Louis. Said board shall organize by the choice from its number of a president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each state in which subscription books have been opened, at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting

so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said coporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and
92 each triennial election of directors by the stockholders two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the government; any vacancy happening in the government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of at least five shares of stock in said company, except the two directors to be appointed by the President as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock, after due notice, at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice-president, and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden

at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said
93 railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *ten* miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all *mineral lands* shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same

is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be pre-
94 sented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the secretary of the treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the secretary of the treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the secretary of the treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not

to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the department of the interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided, to the western boundary of Nevada territory before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale; and when any portion of said route shall be finally located, the secretary of the interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named: *Provided*, That in fixing the point of connection of the main trunk with the eastern connections it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

SEC. 8. *And be it further enacted*, That the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central and practicable route through the territories of the United States to the western boundary of the territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the

same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the
96 Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley, to the aforesaid point on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, in the territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the state of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the department of the interior within six months after the passage of this act.

SEC. 10. *And be it further enacted*, That the said company chartered by the state of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads, respectively, said companies, or either of them, may unite upon equal terms with the first-named company in constructing so much of said railroad and telegraph line, and branch railroads and telegraph lines in this act hereafter mentioned, through the territories from the state of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal & St. Joseph Railroad, the Pacific Railroad Company of
97 Missouri, and the first-named company, or either of them, on filing their assent to this act, as aforesaid, may unite upon

equal terms, under this act, with the said Kansas company, in constructing said railroad and telegraph to said meridian of longitude, with the consent of the said state of Kansas; and in case said first-named company shall complete their line to the eastern boundary of California before it is completed across said state by the Central Pacific Railroad Company of California, said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said state, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said state, is authorized to continue the construction of said railroad and telegraph through the territories of the United States* to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore mentioned and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

SEC. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any state or territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to
98 the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall determine the said location, the companies named in each state and territory to locate the road across the same between the points so agreed upon, except as herein provided. The

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*See section 6, act July 2, 1864. The words "and states intervening" inserted.

track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore & Ohio railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line; and the companies herein named in Missouri, Kansas and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and furnishing said first-mentioned line between the aforesaid point, on the one hundredth meridian of longitude and western boundary of Nevada territory, whenever the same is required by said first-named company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

SEC. 13. *And be it further enacted*, That the Hannibal & Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph, *via* Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose use any railroad charter which has been or may be granted by the legislature of Kansas: *Provided*, That if actual survey shall render it desirable, the said company may construct their road, with the consesnt of the Kansas legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee & Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

SEC. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the state of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and

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the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for, in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeiture as prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

SEC. 15. *And be it further enacted*, That any other railroad company now incorporated or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon just such and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

SEC. 16. *And be it further enacted*, That at any time after the passage of this act, all of the railroad companies named herein, and assenting thereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the department of the
100 interior, and such consolidated company shall thereafter proceed to construct said railroad and branches, and telegraph line, upon the terms and conditions provided in this act.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to in-

sure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to pay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountain[s,] there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the
101 construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

SEC. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco

may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith, to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the secretary of the treasury an annual report, wherein shall be set forth—

First. The names of the stockholders and their places of residence so far as the same can be ascertained;

Second. The names and residences of the directors and all other officers of the company;

Third. The amount of stock subscribed, and the amount thereof actually paid in;

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such survey;

Fifth. The amount received from passengers on the road;

Sixth. The amount received from freight thereon;

Seventh. A statement of the expense of said road and its fixtures;

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof. Which report shall be sworn to by the president of the said company, and shall be presented to the secretary of the treasury on or before the first day of July in each year.

Approved July 1, 1862.

102 B.

[AMENDMENT OF JULY 2, 1864.]

AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars each; that the number of shares shall be one million, instead of one hundred thousand, and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by the government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each

share of one thousand dollars heretofore subscribed, shall be entitled to a certificate for ten shares for one hundred dollars each; and that the following words in section first of said act—"which shall be subscribed for and held in not more than two hundred shares by any one person"—be, and the same are hereby, repealed.

SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company shall cause books to be kept open to receive subscriptions to the capital stock of said company (until the entire capital of one hundred millions of dollars shall be subscribed) at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and Saint Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall, at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company shall be deemed personal property, and shall be transferable on the books of the company at the general office of said company in the city of New York, or at such other transfer office as the company may establish.

103 SEC. 3. *And be it further enacted*, That the Union Pacific R. R. Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-house[s], or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any party to any judge of a court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if

the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee, as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory, or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceedings shall be had in refer-
104 ence to the appraisement of the premises to be taken, and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of, and acquiring a title to, the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant, or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance

thereof to the said company, which shall vest the title thereto in the said company.

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the commissioners of the general land office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler also claims as an agriculturist, and such quantity for each settler who claims as a
105 miner, as the said commissioner may establish by general regulations: *Provided, also*. That the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the center line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereon given at the proper land office.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years, and that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the

payment of the bonds issued by the government in aid of the construction of said roads.

SEC. 6. *And be it further enacted*, That the proviso to section four of said act is hereby modified as follows, viz.: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this is amendatory; and the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States surveyor general for the state of California, instead of being presented to the President of the United States; and the said surveyor general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said
106 railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting after the words "United States," in the last clause, the words "and states intervening."

SEC. 7. *And be it further enacted*, That so much of section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads, is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act, and the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the region of the mountains between the eastern base of the Rocky mountains and the western base of the Sierra Nevada mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required to prepare the road for the superstructure on any such section of twenty miles is done, (which said certificate shall be duly verified,) the secretary of the treasury is hereby authorized and required, upon the delivery of such certificate, to

issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done, the remaining one-third to remain until the said section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act; and no such bonds shall issue to the Union Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one hundredth meridian of longitude.

SEC. 9. *And be it further enacted*, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road: *Provided*, That any bridge or bridges it may construct over the Missouri river, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws
107 for the passage of steamboats, and shall be built, kept, and maintained at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits, and be subject to all the conditions and restrictions of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the 100th degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

SEC. 10. *And be it further enacted*. That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount

not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the government of the United States. And the said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted*, That if any of the railroad companies entitled to bonds of the United States, or to issue their first-mortgage bonds herein provided for, has, at the time of the approval of this act, issued, or shall thereafter issue, any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the said
108 guaranteed bonds, or said first-mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncanceled, shall be deducted from the amount of such government and first-mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first-mortgage bonds shall be granted or permitted, as added to such outstanding, unsatisfied, or uncanceled bonds of the company shall make up the whole amount per mile to which the company would otherwise have been entitled: *And provided further*, That before any bonds shall be so given by the United States, the company claiming them shall present to the secretary of the treasury an affidavit of the president and secretary of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the secretary of the interior. And any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and on conviction thereof shall be punished as aforesaid: *Provided also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto under the provisions of any act or acts other than this act, and the act amended by this act.

SEC. 12. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall build the railroad from the mouth of the Kansas river, by the way of Leavenworth, or if that

be not deemed the best route, then the said company shall, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds. And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall have completed their road to the hundredth degree of longitude, then the last-named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad from the mouth of Kansas river to the one hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided*, That no bonds shall be issued or land certified by the United States to any
109 person or company, for the construction of any part of the main trunk line of said railroad west of the one hundredth meridian of longitude and east of the Rocky mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one hundredth meridian of longitude.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the secretary of the interior, in answer to any inquiries he may make of them touching the condition, management, and progress of the work, and shall communicate to the secretary of the interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road whether built or surveyed; and while absent from home attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

SEC. 14. *And be it further enacted*, That the next election for directors of said railroad shall be held on the first Wednesday of October next, at the office of said company in the city of New York, between the hours of ten o'clock a. m. and four o'clock p. m. of said day; and all subsequent regular elections shall be held annually thereafter at the same place; and the directors shall hold their office for one year, and until their successors are qualified.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to ope-

rate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others; and it shall not be lawful for the proprietors of any line of telegraph, authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured for each offense the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in any court of the United States, or of any state or territory of competent jurisdiction.

SEC. 16. *And be it further enacted*, That any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act, or the laws of the state or states in which the road of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the department of the interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case upon the completion by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consoli-

dated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular, the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts, and things to be done and performed by the government of the United States, by the President of the United
111 States, by the secretaries of the treasury and interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless*, That said defaulting company may, at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits and privileges which shall be acquired, possessed or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits and privileges hereinbefore granted to such other company. And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force and effect to the other: *Provided, however*, That rights and interests at any time acquired by one such consolidated organization, shall not be impaired by another thereof. It is further provided that should the Central Pacific Railroad Company of California complete their line to the eastern line of the state of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road

eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific Road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific Road, and upon doing so, shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company.

SEC. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City be and the same is hereby amended so as to read as follows: That whenever a line
112 of railroad shall be completed through the states of Iowa or Minnesota, to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act, an the act to which this is an amendment, for the construction of the said Union and Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Railroad Company shall be and is hereby released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten mile in width on each side of the same along the whole length of said branch: *And provided further*, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company, designated by the President as aforesaid, may commence, continue and complete the construction of said branch, as contemplated by the provisions of this act: *Provided, however*, That if the said company, so designated by the President as aforesaid, shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all the railroad which shall have been constructed by said company shall be forfeited to and become the property of the United States.

SEC. 18. *And be it further enacted*, That the Burlington & Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the state of Iowa, be, and hereby is, authorized to extend i[t]s road through the territory of Nebraska, from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect by the most practicable route with the main trunk of the Union Pacific Railroad, or that part of

it which runs from Omaha to the said one hundredth meridian of west longitude. And for the purpose of enabling said Burlington & Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said
113 road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, depots, machine shops, switches, side tracks, turn-tables, and water stations. And the United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington & Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the secretary of the interior, and shall also establish the line of said road, and file a map thereof with the secretary of the interior, within one year of the date of said acceptance, when the said secretary shall withdraw the lands embraced in this grant from market.

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioner[s] to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, so far as the same is completed, to the amount aforesaid; and such examination, report and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners to fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the

privileges and immunities granted to the Hannibal & Saint Joseph Railroad Company by the said last-mentioned act, so far as the same may be applicable: *Provided*, That no government bonds shall be issued to the said Burlington & Missouri River Railroad Company to aid in the construction of said extension of its road: *And*
114 *provided, further*, That said extension shall be completed within the period of ten years from the passage of this act.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the commissioner of the general land office for the prosecution of the survey of the public lands along the line of said road, and so from year to year until the whole shall be completed, as provided under the provisions of this act.

SEC. 22. *And be it further enacted*, That Congress may at any time alter, amend, or repeal this act.

Approved July 2, 1864.

C.

[JOINT RESOLUTION OF JULY 26, 1866.]

A RESOLUTION granting the right of way through military reserves to the Union Pacific Railroad Company and its branches.

* * * * * * * *

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to approval by the President, the right of way, one hundred feet in width, is hereby granted to the Union Pacific Railroad, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railway Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite "Riley City"; also, fractional section "one" on the west side of said reservation, near Junction City, for the same purposes; and also to restore from time to time to the public domain any portion of said military reserve over which the Union Pacific Railroad, or any of its branches, may pass, and which shall not be required for military purposes: *Provided*, That the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor.

Approved July 26, 1866.

115 D.

[An act relating to the Denver Pacific, March 3, 1869.]

An act to authorize the transfer of lands granted to the Union Pacific Railway Company, eastern division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, eastern division, be, and it hereby is, authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver city and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

SEC. 2. *And be it further enacted*, That the said Union Pacific Railway Company, eastern division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the Union Pacific Railway Company, eastern division; but nothing herein shall authorize the said eastern division company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

SEC. 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, eastern division: *Provided*, That
116 neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act.

Approved March 3, 1869.

E.

[Joint resolution of March 3, 1869.]

Joint resolution authorizing the Union Pacific Railway Company, eastern division, to change its name to the "Kansas Pacific Railway Company."

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, eastern division, is hereby authorized by resolution of its board of directors, which shall be filed in the office of the secretary of the interior, to change its name to the "Kansas Pacific Railway Company."

Approved March 3, 1869.

117 APPENDIX 3.

Consolidation.—Articles of Consolidation and Documents Relating Thereto.

The Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company, (act of March 3, 1869, 15 Stat. at Large, 324,) consolidated January 24, 1880, under the name of the UNION PACIFIC RAILWAY COMPANY.

The constituent companies are all parts of the Pacific SYSTEM of roads aided by Congress. In the original charter of the companies, (act of July 1, 1862, 12 Stat. at Large, 489,) Congress authorized consolidation, in the sixteenth section, as follows:

A.

SEC. 16. *And be it further enacted*, That at any time after the passage of this act all of the railroad companies named herein and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the department of the interior, and such consolidated company shall thereafter proceed to construct said raid railroad and branches and telegraph line upon the terms and conditions provided in this act.

In the amendatory act of July 2, 1864, (13 Stat. at Large, 356, authority to consolidate was conferred by Congress in the following terms:

B.

SEC. 16. *And be it further enacted*, That any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the state or states in which the road of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a cap-

ital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the
118 department of the interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case upon the completion by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such other point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts, and things to be done and performed by the government of the United States, by the President of the United States, by the secretaries of the treasury and interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may, at any time before receiving pay for its said work

and material as hereinbefore provided, on its own
119 election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits and privileges hereinbefore granted to such other company. And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to continne and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force and effect to the other: *Provided, however*, That rights and interests at any time acquired by one such consolidated organization, shall not be impaired by another thereof. It is further provided that should the Central Pacific Railroad Company of California complete their line to the eastern line of the state of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific Road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific Road, and upon doing so, shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company.

The following official records from the offices of secretaries of state for Nebraska, Kansas and Colorado are printed for the purpose of showing that if it should be held that the state laws of these states in force in 1880 are applicable to the question of consolidation of the Pacific roads, that those laws have been complied with, as well as the acts of Congress—thus putting the power to consolidate and the validity of the consolidation beyond controversy.

In Nebraska, in 1880, railroad corporations were authorized to consolidate when articles of consolidation are approved by a two-thirds vote of the stockholders. (Gen. Sat. of Neb., 1873, pp. 188, 189, secs. 89, 90, 91.)

120 In Kansas, consolidation is authorized "on the approval, in writing, of the persons or parties holding and representing two-thirds of such stock." (Comp. Laws 1879, p. 787, sec. 4932.)

In Colorado, consolidation is authorized if the proposition shall

be approved "by a vote of two-thirds of the stock of each company, severally." (Gen. Laws of Col., 1877, p. 185, sec. 315 [125]; id p. 187, sec. 318 [128].)

C.

Certified Copy of Articles of Consolidation.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October* 23, 1880.

I, Alonzo Bell, acting secretary of the interior, do hereby certify that the annexed are true copies of a certified copy of articles of union and consolidation, and of the ratification of said articles by the stockholders of the Kansas Pacific Railway Company on the files of this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the department to be affixed, the day and year above written.

[SEAL.]

A. BELL,
Acting Secretary of the Interior.

Articles of Union and Consolidation

Between the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, forming the Union Pacific Railway Company.

Whereas the Union Pacific Railroad Company, a corporation duly organized and existing under the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," and the act of Congress of July 2, 1864, and various other acts amendatory of the foregoing, owns a line of railroad and telegraph extending from the Missouri river to Ogden, in the territory of Utah, a distance of 1,042 miles;

And whereas the Kansas Pacific Railway Company, described in the said act of Congress of July 1, 1862, as the Leavenworth, Pawnee & Western Railroad Company, the name whereof was afterward changed to that of the Union Pacific Railway Company, eastern division, and again subsequently changed to the Kansas Pacific Railway Company, is a corporation which is entitled to participate in the benefits of the said act of Congress of July 1, 1862, and of July 2, 1864, and the various acts amendatory thereof and relating thereto;

And whereas the said Kansas Pacific Railway Company owns and operates, as a branch of the Union Pacific Railroad, a rail-
121 road and telegraph line from a point connecting with the Missouri Pacific Railroad in Kansas City, in Missouri; thence from the Missouri river, at the mouth of the Kansas river, on the

south side thereof, with a spur from Wyandotte, in the state of Kansas, being from the east state line of Kansas to Denver, 639 miles in length, with a branch from a point on the main line near Lawrence to Leavenworth, 34 miles in length, in said state of Kansas, connecting at Denver with the Denver Pacific Railway, and is entitled to extend said railroad to the western boundary of the former territory of Kansas, to locate and construct branches of said railroad in the counties of the former territory of Kansas, adjacent to the line of said railroad as then located and defined by law;

And whereas the Denver Pacific Railway and Telegraph Company, under and by virtue of the said acts of Congress, and of an act of Congress approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, eastern division, between Denver and the point of connection with the Union Pacific Railroad to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the territory of Colorado;" and of an act of Congress approved June 20, 1874, which, among other things, enacts that for all the purposes of the said act of July 1, 1862, and of the acts amendatory thereof, "The Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869," whereby and by force whereof the said Denver Pacific Railway and Telegraph Company is likewise entitled to participate in the benefits of the aforementioned acts of Congress of July 1, 1862, and July 2, 1864, and the various acts amendatory thereof and supplemental thereto and relating to the Pacific system of railroads; all of which, whether particularly herein described or not, are, for greater certainty in this behalf, referred to and made part hereof;

And whereas the said Denver Pacific Railway and Telegraph Company owns a line of road one hundred and six miles in length, extending from Denver, where it connects with the said Kansas Pacific Railway, to Cheyenne, where it connects with the Union Pacific Railroad;

And whereas in the aforesaid legislation of Congress applicable to the above mentioned three railroad companies it is provided that they may unite and consolidate their respective orgonizations;

And whereas each of the said above mentioned three companies, by corporate action duly and severally had, have resolved, pursuant to the authority in that behalf vested in them by law, to unite and consolidate their respective organizations into one company,
122 and have severally agreed to and with each other upon the terms of such union and consolidation, being the terms herein embodied and expressed:

Now this agreement and consolidation, made this the 24th day of January, A. D. 1880, between the said Union Pacific Railroad Company, party of the first part, the said Kansas Pacific Railway Com-

pany, party of the second part, and the said Denver Pacific Railway and Telegraph Company, party of the third part, witnesseth:

That the said parties have respectively agreed and do hereby severally agree to and with each other upon the following articles of union and consolidation of their respective organizations into one company, viz:

ARTICLE I. The said Union Pacific Railroad Company, the said Kansas Pacific Railway Company, and the said Denver Pacific Railway and Telegraph Company, in consideration of the premises, do hereby severally agree to and with each other to unite and consolidate, and do hereby unite, form, and consolidate their respective organizations, properties, and companies into one consolidated company, which shall succeed to, possess, and be entitled to receive from the Government of the United States all and singular the grants, benefits, immunities, guaranties, acts and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which the aforesaid three companies, respectively, at the date of this consolidation, are or may be entitled or subject to under the acts of Congress in that behalf, in place and substitution of said constituent companies so consolidated, respectively; and the said consolidated company assumes to and for itself all of the provisions of said acts of Congress, so far as applicable, relating or in any manner appertaining to said constituent companies, or either of them, including the power to sue and be sued in all courts of law and equity within the United States, whether federal or state, and the right of corporations organized under a law of the United States to remove causes from state to federal courts; and all of the provisions of the aforementioned acts of Congress and each of them, so far as in their nature applicable to the company hereby formed, shall apply thereto; it being the intent of the parties hereto and of these articles of union and consolidation to organize the company hereby formed under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company as fully as if the same were incorporated herein at large.

ART. II. The name of the said consolidated company hereby formed shall be "The Union Pacific Railway Company."

ART. III. The capital stock of the said Union Pacific Railway Company shall be fifty millions seven hundred and sixty-two thousand three hundred ($50,762,300) dollars, (being the total aggregate amount of the outstanding stock of the three constituent companies,) which shall be divided into shares of one hundred dollars each; and it shall be issued in lieu of the stock of the
123 said constituent companies on the surrender thereof for that purpose by the respective holders thereof. Every stockholder in the Denver Pacific Railway and Telegraph Company and in the Union Pacific Railroad Company shall receive in place of every share of one hundred dollars surrendered a share of one hundred dollars in the new company; and every stockholder in the Kansas Pacific Railway Company, the shares in which are only fifty

($50) dollars each, shall receive in place of every two shares of the stock at the time held by such stockholder in such company a share of the capital stock of the new corporation, upon surrendering to the new corporation the certificates of stock held by such stockholder.

ART. IV. The said new corporation shall, without unnecessary delay, issue certificates of stock, in such form as may by the board of directors be deemed advisable; and such board shall provide and adopt such rules and regulations as may be necessary and proper for the issuing and transfer of shares of stock of the said new corporation.

ART. V. The directors of the said Union Pacific Railway Company, to be elected by the stockholders at the annual meeting herein provided for, shall be fifteen in number, each of whom must be the *bona fide* owner of at least fifty shares of stock in the consolidated company. Such directors shall be chosen annually by the majority of the votes of the stockholders voting in person or by proxy at such election. And they shall continue to be directors until others are elected and qualified in their places. No person shall be a director unless he shall be qualified to vote for directors at the election at which he shall be chosen; and vacancies in the board of directors may be filled by the remaining directors at any regular meeting of the board. The directors of the said company shall annually, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary.

ART. VI. The following-named persons shall be the first directors of said corporation, viz.: Fred L. Ames, Ezra H. Baker, Elisha Atkins, F. Gordon Dexter, Sidney Dillon, Russell Sage, Jay Gould, Solon Humphreys, David Dows, William L. Scott, Silas H. H. Clark, Thomas T. Eckert, John Sharp, Grenville M. Dodge, Carlos S. Greeley. The following-named persons shall be the first officers of the said corporation, viz.: President, Sidney Dillon; vice-president, Elisha Atkins; treasurer and secretary, Henry McFarland. The said directors and officers shall continue in office until their successors are chosen as provided in these articles.

ART. VII. Until otherwise duly provided, the annual meeting of the stockholders of the Union Pacific Railway Company shall be held at the company's office in the city of New York, on the first Wednesday following the fourth day of March in each year, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day
124 Notice of such meeting shall be given as may be prescribed by the by-laws. These provisions may be changed by the stockholders of the consolidated company at any annual meeting of the said stockholders.

ART. VIII. The parties hereto of the first, and second, and third parts hereby assign, transfer, set over, and convey unto the said Union Pacific Railway Company, the consolidated corporation hereby formed, all the rights, privileges, exemptions, and franchises of each of said companies, parties hereto, and all the property, real, personal and mixed, and all choses in action, debts on whatever account

of, owing or belonging to either of said companies, and all claims, demands, property, rights of way, leases, leasehold interests, branches, iron rails, rolling stock, tools and implements, and property of every description, name, and nature belonging to either of the said companies, with the appurtenances, to be held, owned and controlled by the said consolidated corporation, its successors and assigns, as fully and completely, to all intents and purposes, as the respective parties hereto do or can now own, hold, use, enjoy, or control the same; and the parties hereto agree to execute and deliver to said consolidated corporation instruments of transfer, or assignments, or other instruments proper or necessary to carry out the covenants, conditions and provisions of this agreement. This assignment, transfer, sale and conveyance is made to the said consolidated corporation subject to all liens, charges and equities pertaining thereto.

ART. IX. Nothing in this agreement contained shall affect or prejudice any right otherwise existing of the consolidated company to make such further increase of stock or bonds as said consolidated company may by law be entitled to make, or restrict the amount of stock or bonds which such consolidated company is by law authorized to issue or make. Nor shall anything herein contained affect or impair the right to issue all unissued bonds under the Kansas Pacific consolidated mortgage of date May 1, 1879, wherein Jay Gould and Russell Sage are trustees, but such unissued bonds may, notwithstanding this consolidation, be issued in the same manner, and with the same effect in all respects as if these articles had not been adopted and executed.

And it is expressly agreed that the stockholders of the consolidated company shall have all the powers which would have been possessed by the stockholders of each constituent company if this consolidation had not been effected, to ratify, approve, and carry out any contracts made by either constituent company, and requiring the ratification or approval of its stockholders.

The power of the Union Pacific Railroad Company to issue all unissued bonds under the mortgage of July 1, 1879, wherein the Union Trust Company is trustee, is fully and completely reserved.

ART. X. The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties
125 shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation. But nothing herein contained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company. The corporate existence of the respective constituent companies shall not absolutely cease,

eo instanti, on the consummation of the union and consolidation herein provided for, but shall remain and continue so far as necessary to carry out the intent and purpose hereof.

ART. XI. These articles of consolidation shall go into effect, and the consolidated company hereby formed shall come into existence, upon the day on which a copy hereof is filed in the department of the interior, as provided in the legislation of Congress in that behalf.

ART. XII. The existing by-laws of the Union Pacific Railroad Company are hereby provisionally adopted, and shall apply to the company hereby formed until duly changed or repealed.

ART. XIII. All books, vouchers, records, instruments of title, cash, evidences of debt, contracts, and documents pertaining to the business or property of the said three companies, parties hereto, shall, without delay, be delivered to the proper officers of the consolidated company, and the said books, records, and papers shall be deemed and taken, as far as necessary, as the records and books of said consolidated company; and said books, records, vouchers, and papers shall be subject to the proper examination and inspection of all persons interested therein.

ART. XIV. These articles may be amended and modified from time to time, and in such manner as the holders of two-thirds of the stock of the consolidated company may direct or approve.

ART. XV. This agreement shall be executed on the part of the respective parties hereto by the proper officers, and under the corporate seals of said companies.

In witness whereof, the said parties have caused their respective corporate seals to be hereunto affixed, and the same to be attested by their respective presidents and secretaries, this the 24th day of January, A. D. 1880.

[SEAL.] THE UNION PACIFIC RAILROAD COMPANY,
BY SIDNEY DILLON, *President.*
Attest: HENRY MCFARLAND, *Secretary.*

[SEAL.] THE KANSAS PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*
Attest: A. H. CALEF, *Secretary.*

THE DENVER PACIFIC RAILWAY & TELEGRAPH COMPANY,
[SEAL.] BY D. M. EDGERTON, *President.*
Attest: D. H. MOFFATT, JR., *Acting Secretary.*

126 The Union Pacific Railway Company has signified, and hereby signifies, its assent to and acceptance of the foregoing articles of union and consolidation, January 24, 1880.

[SEAL.] THE UNION PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*

D.

Stockholders' Ratification and Approval.

STATE OF KANSAS, } ss.
Office of secretary of state, }

I, James Smith, secretary of state of the state of Kansas, do hereby certify that the following is a true and correct copy of the copy of the articles of union and consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and Denver Pacific Railway and Telegraph Company, into the Union Pacific Railway Company, and a true and correct copy of the copy of the ratification and approval of the stockholders of the Kansas Pacific Railway Company, and a true and correct copy of the original certificate of A. H. Calef, secretary Kansas Pacific Railway Company, filed in this office April 30, 1880.

(COPY B.)

Stockholders' Ratification and Approval.

Know all men by these presents, that we, the undersigned persons and parties holding and representing the shares of the capital stock of the Kansas Pacific Railway Company, now issued and outstanding, to the extent set forth opposite our respective names, have ratified and approved, and by these presents do ratify and approve, the articles of union and consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, into the Union Pacific Railway Company, dated the 24th day of January, A. D. 1880, and hereby referred to for greater certainty, and made part hereof.

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Names.	*Number of shares.*	*Residence.*
Jay Gould	79,414	New York.
Sidney Dillon	6,118	5 W. 37th street, N.Y.
C. S. Greeley	1,126	Saint Louis, Mo.
G. M. Dodge	119	Council Bluffs, Iowa.
F. Gordon Dexter	2,514	Boston, Mass.
F. Gordon Dexter, trustee	42	Do.
E. H. Baker	548	Do.
Frederick L. Ames	4,035	North Easton, Mass.
C. J. Morrill, by E. H. Baker	548	Boston, Mass.
James M. Ham, treasurer	3,830	New York.
A. G. P. Segur	1,000	Brooklyn, N. H.
Russell Sage	9,977	New York.
C. E. Silkworth	1,000	Do.
F. L. Mathez	900	Do.
Myers, Rutherford & Co	9,015	Do.
James Buell, by Russell Sage	1,078	Do.
Prince & Whitely	400	Do.

Names.	*Number of shares.*	*Residence.*
Mills, Robeson & Smith	100	New York.
Robin & Robinson	500	Do.
L. D. Alexander	300	Do.
Field & James	300	Do.
A. M. Kidder & Co.	200	Do.
Ham & Munroe	829	Do.
Edwin H. Perkins, jr., by Russell Sage.	718	Do.
Woerishhoffer & Co.	1,300	Do.
John S. Tilney & Co.	300	Do.
Edward Sweet & Co.	200	Do.
Groot & Chapman	1,000	Do.
F. W. Gilley, jr., & Co.	500	Do.
L. Chase & Co.	400	Do.
Hewson, Kilbreth & Co.	1,406	Do.
Iselin & Barker	2,000	Do.
George W. Perkins	718	Do.
James F. Woodward	718	Do.
Jacob Berry	1,300	Do.
Grant & Co.	500	Do.
V. B. King	1,400	Do.
B. P. Learned & Co.	300	Do.
E. C. Homans & Co.	200	Do.
Archibald Turner & Co.	200	Do.
P. W. Gallandet	300	Do.
Putnam & Earle	400	Do.
H. L. Horton & Co.	200	Do.
Chase & Higginson	15,607	Do.
William Alexander Smith	2,000	Do.
William Alexander Smith & Co., attorney	600	Do.
Do.	800	Do.
Addison Cammack	201	Do.

THE STATE OF NEW YORK,
City and county of New York.

I, A. H. Calef, secretary of the Kansas Pacific Railway Company, do hereby certify and state that annexed hereto is a true copy of the articles of union and consolidation of the Union Pacific, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company into the Union Pacific Railway Company. And I further certify and state that the said articles of union and consolidation were ratified and approved in writing before said articles took effect, by stockholders holding and representing more than two-thirds of all the stock of the said Kansas Pacific Railway Company, a copy of which ratification and approval is hereto annexed, marked
128 B, and made part of this certificate; and I further certify and state that up to the date of making this certificate that stock-

holders holding 199,084 shares of stock of the said Kansas Pacific Railway Company have, pursuant to said articles of union and consolidation, surrendered their stock in said Kansas Pacific Railway Company, and exchanged the same for and received in lieu thereof the stock of said Union Pacific Railway Company.

In witness whereof I have hereunto set my hand and the seal of the said Kansas Pacific Railway Company this 26th day of April, A. D. 1880.

[SEAL.] (Signed) A. H. CALEF,
Secretary Kansas Pacific Railway Company.

In testimony whereof I have hereunto subscribed my name and affixed my official seal. Done at Topeka, this 1st day of May, A. D. 1880.

[SEAL.] (Signed) JAMES SMITH,
Secretary of State.

E.

Proceedings of meeting of stockholders of the Union Pacific Railroad Company, held August 18, 1880, *at Omaha, Neb., ratifying the articles of union and consolidation.*

At a meeting of the stockholders of the Union Pacific Railroad Company, held at the office of said company in the city of Omaha, Neb., on the 18th day of August, 1880, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, said meeting being held in pursuance of the call therefor and notices thereof given, as appearing by the following certificate of Henry McFarland, secretary of the said company, in words and figures as follows:

[COPY.]

I, Henry McFarland, hereby certify that I am the secretary of the Union Pacific Railroad Company, and as such secretary I have charge of the records and files of said company; that it appears by said records that at a meeting of the executive committee of the board of directors of the Union Pacific Railroad Company, held in New York on March 10, 1880, at which were present Messrs. Dillon, Atkins, Baker, Dexter, and Ames, it was, on motion of Mr. Baker, seconded by Mr. Atkins,

"*Voted*, That the president be authorized to call a special meeting of the stockholders of the Union Pacific Railroad Company at such time and place and in such manner as counsel may advise, to take action in respect to the articles of consolidation and union, with a view to a formal ratification and record thereof in the state of Nebraska and elsewhere."

I further certify that at a meeting of the directors of the Union Pacific Railroad Company, held in Boston on March 5, 1879, it was, on motion of Mr. Sage,

"*Resolved*, That while the board of directors is not in session
129 the full power thereof under the charter and by-laws be, and it hereby is, conferred upon the executive committee."

I further certify, that it appears by said records that the following communication was received and placed on the files of the company, to wit:

"To SIDNEY DILLON,

"*President of the Union Pacific Railroad Company:*

"The undersigned owners of the number of shares of stock in said company set opposite respective names, in the aggregate amounting to more than one-fourth of all the capital stock, hereby make application to you to call a special meeting of the stockholders of said company, to be held at the office of the company, in Omaha, on the 18th day of August, 1880, for the purpose of determining by vote of the corporation, its assent to or dissent from the articles of union and consolidation between said company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, of date January 24, 1880.

"The undersigned ask that the notice of such special meeting be given and published as required by law on that behalf, stating the object of the meeting.

"The separate assent of more than two-thirds of the stock in the Union Pacific Railroad Company having been given to the said articles of union and consolidation, the undersigned deem it proper that a meeting be called, that such assent may be manifested by a recorded vote of the stockholders at a meeting of the company to be held for that purpose.

Names of stockholder.	*Number of shares.*	*Amount.*
Sidney Dillon	27,150	$2,715,000
Sidney Dillon, trustee	12,150	1,200,000
Hannah Dillon	2,000	200,000
E. H. Baker, for self and others	8,000	800,000
Fred. L. Ames, executor	37,515	3,751,500
Fred. L. Ames	1,357	135,700
Helen A. Ames, by F. L. Ames, attorney	1,000	100,000
Oliver Ames and Sons	140	14,000
W. E. Connor	21,400	2,140,000
A. G. P. Segur	6,305	630,500
E. A. Quinn	1,500	150,000
C E. Silkworth	3,300	330,000
F. L. Mathez, jr	2,500	250,000
William D. Segur	1,000	100,000
H. Cumiskey	1,000	100,000

I further certify, that in pursuance of said resolution of the executive committee, passed on March 10, 1880, and in pursuance of the application in writing of stockholders owning in the aggregate

more than one-fourth of all the capital stock of the company, the following notice, to wit:

130 "PUBLIC NOTICE.

"Whereas stockholders holding more than one-fourth part of the capital stock of the Union Pacific Railroad Company have duly applied in writing to the undersigned, the president of said company, to call a special meeting of the stockholders of said company, for the purpose of determining, by vote of the corporation, its assent to or dissent from the articles of union and consolidation between said company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, of date January 24, 1880—said application stating that the separate assent of more than two-thirds of the stock in the Union Pacific Railroad Company has been given to said articles of union and consolidation—it is deemed proper that a special meeting of the stockholders be called, that such assent be manifested by a recorded vote of the stockholders, at a meeting of the company to be held for that purpose:

"Now, therefore, pursuant to said application, I, Sidney Dillon, president of the said Union Pacific Railroad Company, do, by order of the board of directors, hereby call a special meeting of the stockholders of said company, to be held at the office of the Union Pacific Railroad Company, in the city of Omaha, Nebraska, on the 18th day of August, A. D. 1880, between the hours of ten o'clock a. m. and four o'clock p. m. on said day, for the purpose of determining, by vote of said corporation, its assent to or dissent from the said articles of union and consolidation, dated January 24, 1880, a copy of which has been duly filed with the secretary of the interior, and the original of which is on file, and can be seen at the company's office, 78 Broadway, New York.

"Given under my hand this 4th day of May, A. D. 1880.

"SIDNEY DILLON,

"*President of the Union Pacific Railroad Company.*

"HENRY MCFARLAND,

Secretary.

"N. B.—Nearly all stockholders having already assented to the consolidation, the purpose of the proposed meeting is merely to have that assent take the form of a recorded vote."

was sent on May 15, 1880, by mail, postage prepaid, to all the stockholders in the Union Pacific Railroad Company of record at the closing of the stock-books on January 24, 1880, and that the same notice was published in the Boston *Daily Advertiser*, a newspaper published in the city of Boston, Mass., daily, excepting the intervening Sundays, from and commencing with July 9 to August 12, inclusive, constituting thirty publications of said notice in said paper; and that the same notice was published in the New York *Tribune*, a newspaper published in the city of New York, daily, from and commencing with July 10 to August 9, inclusive, constituting thirty publications of said notice in said paper.

The sworn statements of the foremen or publishers of those newspapers are annexed.

And the same notice was also published in a newspaper published at Omaha, Nebraska, (Omaha being the city in Nebraska in which said corporation has its principal office of business,) called the Omaha *Weekly Herald*, as follows, viz: From and commencing with the 21st day of May, 1880, to the 8th day of July, A. D. 1880, inclusive, being more than six consecutive weeks prior to August 18, as shown by the affidavit of the book-keeper of said newspaper.

131 And the same notice was by me also addressed by name, and on May 18, 1880, sent by mail, postage prepaid, to each stockholder of record, as shown by the stock-books in the Union Pacific Railway Company, at Boston, at the close of business on May 4, 1880, and also in like manner to all stockholders in said company of record on the stock-books in New York, at the close of business on May 5, 1880, to whom, as stockholders in the Union Pacific Railroad Company, notice had not been sent on May 5, 1880, as hereinbefore stated.

HENRY McFARLAND,
Secretary Union Pacific Railroad Company.

STATE OF MASSACHUSETTS,
County of Suffolk, } ss.

Subscribed and sworn to before me.
[SEAL.] JAMES G. HARRIS,
Notary Public.

"PUBLIC NOTICE.

"Whereas stockholders owning more than one-fourth part of the capital stock of the Union Pacific Railroad Company have duly applied in writing to the undersigned, the president of said company, to call a special meeting of the stockholders of said company for the purpose of determining by vote of the corporation its assent to or dissent from the articles of union and consolidation between said company, the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company, of date January 24, 1880—said application stating that the separate assent of more than two-thirds of the stock in the Union Pacific Railroad Company has been given to said articles of union and consolidation—it is deemed proper that a special meeting of the stockholders be called, that such assent be manifested by a recorded vote of the stockholders, at a meeting of the company to be held for that purpose:

"Now, therefore, pursuant to said application, I, Sidney Dillon, president of the said Union Pacific Railroad Company, do, by order of the board of directors, hereby call a special meeting of the stockholders of said company, to be held at the office of the Union Pacific Railroad Company, in the city of Omaha, Nebraska, on the 18th day of August, A. D. 1880, between the hours of 10 o'clock a. m.

and 4 o'clock p. m. on said day, for the purpose of determining by vote of the said corporation its assent to or dissent from the said articles of union and consolidation, dated January 24th, 1880, a copy of which has been duly filed with the secretary of the interior, and the original of which is on file and can be seen at the company's office, 78 Broadway, New York.

"Given under my hand this 4th day of May, A. D. 1880.

"SIDNEY DILLON,
"*President of the Union Pacific Railroad Company.*
"HENRY McFARLAND,
"*Secretary.*

"N. B.—Nearly all stockholders having already assented to the consolidation, the purpose of the proposed meeting is merely to have that assent take the form of a recorded vote."

Proofs of the due publication of the notices in the foregoing certificate referred to and thereto annexed:

132 "STATE OF NEW YORK,
City and county of New York, } *ss.*

"W. P. Thompson, being duly sworn, saith that he is foreman in the office of the New York Daily Tribune, a newspaper printed in the city of New York; that the advertisement hereto annexed has been regularly published in the said New York Daily Tribune thirty times successively, commencing on the 10th day of July, 1880.

"W. P. THOMPSON.

"Sworn to before me, this 9th day of August, 1880.

"GORDON L. FORD,
Notary Public Kings co., N. Y. (and N. Y. co.)"

"STATE OF NEBRASKA,
Douglas county, } *ss.*

"W. H. Remington, being duly sworn, deposes and says that he is book-keeper of the Omaha Weekly Herald, a newspaper printed at Omaha, in the said county of Douglas; that the printed notice hereto attached was published in the said weekly newspaper six consecutive weeks next after and including the 21st day of May, A. D. 1880. The said newspaper was, during that time, in general circulation in the county of Douglas and state of Nebraska.

(Signed) W. H. REMINGTON.

"Subscribed in my presence, and sworn to before me, this 8th day of July, 1880.

[SEAL. GEO. H. BOGGS,
Notary Public.

"Printer's fees, $14; affidavit, 25 cents; total, $14.25."

"STATE OF MASSACHUSETTS, } ss.
County of Suffolk, }

"On the 13th day of August, A. D. 1880, personally appeared before the undersigned, a justice of the peace within and for said county and state, E. F. Waters, treasurer, publisher of the Boston Daily Advertiser, a daily newspaper published at Boston, county of Suffolk, in the state of Massachusetts, and who, being duly sworn, states on oath that the 'notice special meeting stockholders Union Pacific Railroad Co.,' a true copy of which is hereto annexed, was published in said newspaper, in its issue of July 9, 1880, and thirty successive days in all, not including Sundays.

"BOSTON DAILY ADVERTISER,
"E. F. WATERS, *Treasurer.*

"Subscribed and sworn to before me, this 13th day of August, 1880.

"URIAH A. POLLARD,
"*Justice of the Peace.*"

The following proceedings were had:

The stockholders assembled at the time and place above mentioned, and organized by electing Joseph W. Gannett chairman, and A. J. Poppleton secretary of said meeting.

The secretary thereupon explained the object of said meeting to be to determine by a vote of the stockholders of the corporation its assent to or dissent from the articles of union and consolidation dated January 24, 1880, a copy of which has been duly filed with the secretary of the interior, and the original of which was presented to the stockholders assembled as aforesaid.

On motion of Mr. Poppleton, duly seconded, it was

Voted, That the chairman, Mr. Gannett, and Mr. Vis be appointed a committee to examine and report to the meeting the names of the stockholders present in person or by proxy, and the number of shares of stock held by them respectively in the Union Pacific Railroad Company, as shown on the books of said company, on
133 24th day of January, 1880, and who are entitled to vote at this meeting, which committee performed that duty and reported the following shares of such stock as being represented, and the same were of record upon the stock books of the Union Pacific Railroad Company on the said 24th day of January, 1880, to wit:

Names of shareholders present, in person or by proxy, and number of shares of stock in the Union Pacific Railroad Company held by them, as shown on the books of the company, on the 24th day of January, 1880, and which have not been exchanged for shares in the Union Pacific Railway Company.

Names.	*Proxies.*	*Number of shares.*
Sidney Dillon	J. W. Gannett	50
Estate of Oliver Ames, by Fred L. Ames, executor	do	37,115
Fred. L. Ames	do	1,357
Oliver Ames & Sons	J. W. Gannett (38,612)	140
First National Bank of Easton, as collateral	do	500
		39,162

On motion, the report of the committee was received and adopted.

On motion of Mr. Poppleton, duly seconded, it was

Resolved, That the said articles of union and consolidation, dated January 24, 1880, the original of which is here presented, and a copy of which is on file with the secretary of the interior, as above stated, whereby the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company have severally agreed to unite and consolidate into a new company called the Union Pacific Railway Company, be and the same are hereby ratified and approved, which said resolution was adopted by a vote of the following shares of stock in the said Union Pacific Railroad Company, standing on the books of said company on the 24th day of January, 1880, to wit:

Names.	*Proxies.*	*Number of shares.*
Sidney Dillon	J. W. Gannett	50
Estate of Oliver Ames, by Fred L. Ames, executor	do	37,115
Fred. L. Ames	do	1,357
Oliver Ames & Sons	do	140
First National Bank of Easton, as collateral	do	500
		39,162

There were no votes cast against the said resolution, and the said resolution was thereupon declared adopted, and ordered to be recorded.

On motion of Mr. Poppleton, duly seconded, it was

Voted, That Mr. Gannett and Mr. Vis be appointed a committee to examine and report to the meeting the names of share-
134 holders and number of shares of stock in the said Union Pacific Railroad Company, which had been exchanged be-

tween the 24th day of January, 1880, and the 9th day of August, 1880, into the stock issued by the Union Pacific Railway Company, and which were entitled to vote at this meeting.

Said committee reported the following shares of such stock were represented and entitled to vote at this meeting, to wit:

Names of shareholders and number of shares of stock in the Union Pacific Railroad Company which have been exchanged between the 24th day of January, 1880, and the 9th day of August, 1880, into the stock issued by the Union Pacific Railway Company, entitled to vote at this meeting.

Names.	*Proxies.*		*Number of shares.*
Helen A. Ames	A. J. Poppleton		1,000
Fred. L. Ames	do		1,813
Oakes A. Ames	do		100
Oliver Ames, and Oliver Ames as collateral	do		600
Elisha Atkins	do	500	
Do	do	2,165	
E. Atkins & Co	do	500	
F. Gordon Dexter	do	3,554	
S. Hooper & Co	do	2,164	
			8,373
Ezra H. Baker	do		2,330
Ester H. Baker	do		1,300
Rogers L. Barstow and Ezra L. Baker, trustees	do		1,200
John R. Brewer, executor	do	25	
Do	do	925	
			950
Geo. M. Barnard and Samuel Barnard, trustees	do		100
Joshua Ballard	do		250
Samuel Carr	do		100
Joseph H. Converse	do		300
F. Gordon Dexter, trustee	do		1,278
Faneuil Hall National Bank	do		2,315
Do	do		100
E. W. Gilmore	do		800
Jackson & Curtis	do		250
Helena M. Kent	do		1,300
George W. Kennedy	do		200
H. A. Lathrop	do	203	
H. A. Lathrop & Co	do	220	
			423
Rollins, Morse & Bro	do		275
I. E. Morrison	do		200
Mechanics' National Bank	do		200

Names.	*Proxies.*		*Number of shares.*
C. J. Morrill	A. J. Poppleton		1,996
John C. Sharp	do	100	
Mrs. Helen Sharp	do	400	
			500
Second National Bank of Boston	do		1,000
Thomas M. Stetson	do		780
Walker & Bro	do		600
H. C. Wainwright & Co	do		250
The Tremont National Bank	do		3,265
Tower, Giddings & Co	do		100
Putnam & Earle	do		500
Myers, Rutherford & Co	do		5,585½
Martin & Runyon	do		1,450
H. B. Hollins & Co	do		100
James M. Ham, treasurer	do		7,140
W. S. Gurney, jr., & Co	do		4,000
Jay Gould	do		1,620
Clark, Dodge & Co	do		1,100
O. N. Bogart & Co	do		900
John Bloodgood & Co	do		400
A. H. Brown	do		1,050
Blake Bros. & Co	do		2,780
Bound & Co	do		1,314
135 Belden, Bennett & Co	do		5,320
Closson & Hays	do		2,240
W. E. Connor	do		7,000
James R. Cowing	do		500
R. L. Cutting, jr., & Co	do		300
David Dows	do		1,000
Hannah Dillon	do		2,000
Sidney Dillon, trustee	do		12,100
Do	do		34,399
James H. Moore	do		425
F. W. Gilley, jr., & Co	do		6,110
Gregory & Ballou	do		1,100
Hallgarten & Co	do		1,400
Harriott & Noyes	do		400
W. T. Hatch & Sons	do		1,750
Edward King, president	do	5,000	
Do	do	8	
			5,008
Horace Manuel & Co	do		100
F. L. Mathez	do		18,100
G. P. Morosini	do		20,041½
Morton, Bliss & Co	do		1,802
E. A. Quinn	do		1,000

Names.	*Proxies.*	*Number of shares.*
David Richmond	A. J. Poppleton	3,803
Russell Sage	do	15,266
A. G. P. Segur	do	9,405
Vermilye & Co	do	3,261
Isaac Thacher	do	2,514
Moe S. Lott	do	4,400
Aaron Hobart, jr	do	1,033
E. Emmett	do	1,000
John J. Cisco & Son	do	400
G. M. Dodge	do	1,306
Dominick & Dickerman	do	200
Charles Head & Co	do	675
William Heath & Co	do	600
Brayton Ives & Co	do	1,000
De Neufville & Co	do	845
C. E. Silkworth	do	2,000
Scott & Leavitt	do	1,300
Trask & Francis	do	1,184
Whitehouse & Co	do	400
Total		240,465

On motion of Mr. Poppleton, duly seconded, it was

Resolved, That the articles of union and consolidation, whereby the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company were united and consolidated into the Union Pacific Railway Company, of date January 24, 1880, the original whereof is here presented, and a copy whereof is on file with the secretary of the interior, be and the same are hereby ratified and approved.

The said resolution was passed by a vote of the following shares:

Name of shareholders and number of shares of stock in the Union Pacific Railroad Company have which been exchanged between the 24th day of January, 1880, and the 9th day of August, 1880, into the stock issued by the Union Pacific Railway Company entitled to vote at this meeting.

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Names.	*Proxies.*	*Number of shares.*
Helen A. Ames	A. J. Poppleton	1,000
Fred. L. Ames	do	1,813
Oakes A. Ames	do	100
Oliver Ames, and Oliver Ames as collateral	do	600
Elisha Atkins	do	500
Do	do	2,165
E. Atkins & Co	do	500

Names.	*Proxies.*		*Number of shares.*
F. Gordon Dexter	do	3,544	
S. Hooper & Co	do	2,164	
			8,873
Ezra H. Baker	do		2,330
Esther H. Baker	do		1,300
Rogers L. Barstow and Ezra H. Baker, trustees	do		1,200
John R. Brewer, executor	do	25	
Do	do	925	
			950
Geo. M. Barnard and Sam'l Barnard, trustees	do		100
Joshua Ballard	do		250
Samuel Carr	do		100
Joseph H. Converse	do		300
F. Gordon Dexter, trustee	do		1,278
Faneuil Hall National Bank	do		2,315
Do	do		100
E. W. Gilmore	do		800
Jackson & Curtis	do		250
Helena M. Kent	do		1,300
George W. Kennedy	do		200
H. A. Lothrop	do	203	
H. A. Lothrop & Co	do	220	
			423
E. Rollins Morse & Brother	do		275
I. E. Morrison	do		200
Mechanics' National Bank	do		200
C. J. Morrill	do		1,996
John C. Sharp	do	100	
Mrs. Helen Sharp	do	400	
			500
Second National Bank of Boston	do		1,000
Thomas M. Stetson	do		780
Walker & Brother	do		600
H. C. Wainwright & Co	do		250
The Tremont National Bank	do		3,265
Tower, Giddings & Co	do		100
Putnam & Earle	do		500
Myers, Rutherford & Co	do		4,585½
Martin & Runyon	do		1,450
H. B. Hollins & Co	do		100
James M. Ham, treasurer	do		7,140
W. S. Gurney, jr., & Co	do		4,000
Jay Gould	do		1,620
Clark, Dodge & Co	do		1,100
O. N. Bogart & Co	do		900

	Names.	*Proxies.*		*Number of shares.*
	John Bloodgood & Co	do		400
	A. H. Brown	do		1,050
	Blake Brothers & Co	do		2,780
	Bound & Co	do		1,314
	Belden, Bennett & Co	do		5,320
	Closson & Hays	do		2,240
	W. E. Connor	do		7,000
	James R. Cowing	do		500
	R. L. Cutting, jr., & Co	do		300
	David Dows	do		1,000
	Hannah Dillon	do		2,000
	Sidney Dillon, trustee	do		12,100
	Do	do		34,399
	James H. Moore	do		425
	F. W. Gilley, jr., & Co	do		6,110
	Gregory & Ballou	do		1,100
	Hallgarten & Co	do		1,400
137	Harriott & Noyes	A. J. Poppleton		400
	W. T. Hatch & Sons	do		1,750
	Edward King, president	do	5,000	
	Do	do	8	
				5,008
	Horace Manuel & Co	do		100
	F. L. Mathez	do		18,100
	G. P. Morosini	do		20,041½
	Morton, Bliss & Co	do		1,802
	E. A. Quinn	do		1,000
	David Richmond	do		3,803
	Russell Sage	do		15,266
	A. G. P. Segur	do		9,405
	Vermilye & Co	do		3,261
	Isaac Thacher	do		2,514
	Moe S. Lott	do		4,400
	Aaron Hobart, jr	do		1,033
	E. Emmett	do		1,000
	John J. Cisco & Son	do		400
	G. M. Dodge	do		1,306
	Dominick & Dickerman	do		200
	Charles Head & Co	do		675
	William Heath & Co	do		600
	Brayton Ives & Co	do		1,000
	DeNeufville & Co	do		845
	C. E. Silkworth	do		2,000
	Scott & Leavitt	do		1,300
	Trask & Francis	do		1,184
	Whitehouse & Co	do		400
	Total			240,465

There were no votes cast against the said resolution, whereupon the said resolution was declared adopted, and ordered to be entered of record.

On motion of Mr. Poppleton, duly seconded, it was

Resolved, That a copy of the said articles of union and consolidation, together with the proceedings of the meeting ratifying the same, be filed with the secretary of the interior, and with the secretaries of state of the states of Nebraska, Kansas, and Colorado.

On motion of Mr. Poppleton, duly seconded, it was

Resolved, That the board of directors named in the said articles of union and consolidation, or their executive committee, be authorized to execute any and all instruments, and do any and all acts necessary to effectuate the purposes of this meeting, and carry out said articles of consolidation.

On motion of Mr. Vis, duly seconded, there being no further business, the meeting adjourned *sine die*.

JOSEPH W. GANNETT, *Chairman*.

Attest: A. J. POPPLETON, *Secretary*

138 F.

["A."]

ARTICLES OF UNION AND CONSOLIDATION.

Between the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, forming the Union Pacific Railway Company.

Articles of Union and Consolidation.

Whereas the Union Pacific Railroad Company, a corporation duly organized and existing under the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," and the act of Congress of July 2, 1864, and various other acts amendatory of the foregoing, owns a line of railroad and telegraph extending from the Missouri river to Ogden, in the territory of Utah, a distance of 1,042 miles;

And whereas the Kansas Pacific Railway Company, described in the said act of Congress of July 1, 1862, as the Leavenworth, Pawnee & Western Railroad Company, the name whereof was afterward changed to that of the Union Pacific Railway Company, eastern division, and again subsequently changed to the Kansas Pacific Railway Company, is a corporation which is entitled to participate in the benefits of the said act of Congress of July 1, 1862, and of July 2, 1864, and the various acts amendatory thereof and relating thereto;

And whereas the said Kansas Pacific Railway Company owns and operates, as a branch of the Union Pacific Railroad, a rail-
139 road and telegraph line from a point connecting with the Missouri Pacific Railroad in Kansas City, in Missouri; thence

from the Missouri river, at the mouth of the Kansas river, on the south side thereof, with a spur from Wyandotte, in the state of Kansas, being from the east state line of Kansas to Denver, 639 miles in length, with a branch from a point on the main line near Lawrence to Leavenworth, 34 miles in length, in said state of Kansas, connecting at Denver with the Denver Pacific Railway, and is entitled to extend said railroad to the western boundary of the former territory of Kansas, to locate and construct branches of said railroad in the counties of the former territory of Kansas, adjacent to the line of said railroad as then located and defined by law;

And whereas the Denver Pacific Railway and Telegraph Company, under and by virtue of the said acts of Congress, and of an act of Congress approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, eastern division, between Denver and the point of connection with the Union Pacific Railroad to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the territory of Colorado;" and of an act of Congress approved June 20, 1874, which, among other things, enacts that for all the purposes of the said act of July 1, 1862, and of the acts amendatory thereof, "The Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869," whereby and by force whereof the said Denver Pacific Railway and Telegraph Company is likewise entitled to participate in the benefits of the aforementioned acts of Congress of July 1, 1862, and July 2, 1864, and the various acts amendatory thereof and supplemental thereto and relating to the Pacific system of railroads; all of which, whether particularly herein described or not, are, for greater certainty in this behalf, referred to and made part hereof;

And whereas the said Denver Pacific Railway and Telegraph Company owns a line of road one hundred and six miles in length, extending from Denver, where it connects with the said Kansas Pacific Railway, to Cheyenne, where it connects with the Union Pacific Railroad;

And whereas in the aforesaid legislation of Congress applicable to the above mentioned three railroad companies it is provided that they may unite and consolidate their respective orgonizations;

And whereas each of the said above mentioned three companies, by corporate action duly and severally had, have resolved, pursuant to the authority in that behalf vested in them by law, to unite and consolidate their respective organizations into one company, and have severally agreed to and with each other upon the terms of such union and consolidation, being the terms herein embodied and expressed:

Now this agreement and consolidation, made this the 24th day of January, A. D. 1880, between the said Union Pacific Railroad Com-

pany, party of the first part, the said Kansas Pacific Railway Company, party of the second part, and the said Denver Pacific Railway and Telegraph Company, party of the third part, witnesseth:

That the said parties have respectively agreed and do hereby severally agree to and with each other upon the following articles of union and consolidation of their respective organizations into one company, viz:

ARTICLE I. The said Union Pacific Railroad Company, the said Kansas Pacific Railway Company, and the said Denver Pacific Railway and Telegraph Company, in consideration of the premises, do hereby severally agree to and with each other to unite and consolidate, and do hereby unite, form, and consolidate their respective organizations, properties, and companies into one consolidated company, which shall succeed to, possess, and be entitled to receive from the Government of the United States all and singular the grants, benefits, immunities, guaranties, acts and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which the aforesaid three companies, respectively, at the date of this consolidation, are or may be entitled or subject to under the acts of Congress in that behalf, in place and substitution of said constituent companies so consolidated, respectively; and the said consolidated company assumes to and for itself all of the provisions of said acts of Congress, so far as applicable, relating or in any manner appertaining to said constituent companies, or either of them, including the power to sue and be sued in all courts of law and equity within the United States, whether federal or state, and the right of corporations organized under a law of the United States to remove causes from state to federal courts; and all of the provisions of the aforementioned acts of Congress and each of them, so far as in their nature applicable to the company hereby formed, shall apply thereto; it being the intent of the parties hereto and of these articles of union and consolidation to organize the company hereby formed under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company as fully as if the same were incorporated herein at large.

ART. II. The name of the said consolidated company hereby formed shall be "The Union Pacific Railway Company."

ART. III. The capital stock of the said Union Pacific Railway Company shall be fifty millions seven hundred and sixty-two thousand three hundred ($50,762,300) dollars, (being the total aggregate amount of the outstanding stock of the three constituent companies,) which shall be divided into shares of one hundred dollars each; and it shall be issued in lieu of the stock of the
141 said constituent companies on the surrender thereof for that purpose by the respective holders thereof. Every stockholder in the Denver Pacific Railway and Telegraph Company and in the Union Pacific Railroad Company shall receive in place of every share of one hundred dollars surrendered a share of one hundred dollars in the new company; and every stockholder in the

Kansas Pacific Railway Company, the shares in which are only fifty ($50) dollars each, shall receive in place of every two shares of the stock at the time held by such stockholder in such company a share of the capital stock of the new corporation, upon surrendering to the new corporation the certificates of stock held by such stockholder.

ART. IV. The said new corporation shall, without unnecessary delay, issue certificates of stock, in such form as may by the board of directors be deemed advisable; and such board shall provide and adopt such rules and regulations as may be necessary and proper for the issuing and transfer of shares of stock of the said new corporation.

ART. V. The directors of the said Union Pacific Railway Company, to be elected by the stockholders at the annual meeting herein provided for, shall be fifteen in number, each of whom must be the *bona fide* owner of at least fifty shares of stock in the consolidated company. Such directors shall be chosen annually by the majority of the votes of the stockholders voting in person or by proxy at such election. And they shall continue to be directors until others are elected and qualified in their places. No person shall be a director unless he shall be qualified to vote for directors at the election at which he shall be chosen; and vacancies in the board of directors may be filled by the remaining directors at any regular meeting of the board. The directors of the said company shall annually, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary.

ART. VI. The following-named persons shall be the first directors of said corporation, viz.: Fred L. Ames, Ezra H. Baker, Elisha Atkins, F. Gordon Dexter, Sidney Dillon, Russell Sage, Jay Gould, Solon Humphreys, David Dows, William L. Scott, Silas H. H. Clark, Thomas T. Eckert, John Sharp, Grenville M. Dodge, Carlos S. Greeley. The following-named persons shall be the first officers of the said corporation, viz.: President, Sidney Dillon; vice-president, Elisha Atkins; treasurer and secretary, Henry McFarland. The said directors and officers shall continue in office until their successors are chosen as provided in these articles.

ART. VII. Until otherwise duly provided, the annual meeting of the stockholders of the Union Pacific Railway Company shall be held at the company's office in the city of New York, on the first Wednesday following the fourth day of March in each year, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day.
142 Notice of such meeting shall be given as may be prescribed by the by-laws. These provisions may be changed by the stockholders of the consolidated company at any annual meeting of the said stockholders.

ART. VIII. The parties hereto of the first, and second, and third parts hereby assign, transfer, set over, and convey unto the said Union Pacific Railway Company, the consolidated corporation hereby formed, all the rights, privileges, exemptions, and franchises of each of said companies, parties hereto, and all the property, real, per-

sonal and mixed, and all choses in action, debts on whatever account of, owing or belonging to either of said companies, and all claims, demands, property, rights of way, leases, leasehold interests, branches, iron rails, rolling stock, tools and implements, and property of every description, name, and nature belonging to either of the said companies, with the appurtenances, to be held, owned and controlled by the said consolidated corporation, its successors and assigns, as fully and completely, to all intents and purposes, as the respective parties hereto do or can now own, hold, use, enjoy, or control the same; and the parties hereto agree to execute and deliver to said consolidated corporation instruments of transfer, or assignments, or other instruments proper or necessary to carry out the covenants, conditions and provisions of this agreement. This assignment, transfer, sale and conveyance is made to the said consolidated corporation subject to all liens, charges and equities pertaining thereto.

ART. IX. Nothing in this agreement contained shall affect or prejudice any right otherwise existing of the consolidated company to make such further increase of stock or bonds as said consolidated company may by law be entitled to make, or restrict the amount of stock or bonds which such consolidated company is by law authorized to issue or make. Nor shall anything herein contained affect or impair the right to issue all unissued bonds under the Kansas Pacific consolidated mortgage of date May 1, 1879, wherein Jay Gould and Russell Sage are trustees, but such unissued bonds may, notwithstanding this consolidation, be issued in the same manner, and with the same effect in all respects as if these articles had not been adopted and executed.

And it is expressly agreed that the stockholders of the consolidated company shall have all the powers which would have been possessed by the stockholders of each constituent company if this consolidation had not been effected, to ratify, approve, and carry out any contracts made by either constituent company, and requiring the ratification or approval of its stockholders.

The power of the Union Pacific Railroad Company to issue all unissued bonds under the mortgage of July 1, 1879, wherein the Union Trust Company is trustee, is fully and completely reserved.

ART. X. The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties
143 shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation. But nothing herein contained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company. The corporate existence of the respective constituent companies shall not absolutely cease,

eo instanti, on the consummation of the union and consolidation herein provided for, but shall remain and continue so far as necessary to carry out the intent and purpose hereof.

ART. XI. These articles of consolidation shall go into effect, and the consolidated company hereby formed shall come into existence, upon the day on which a copy hereof is filed in the department of the interior, as provided in the legislation of Congress in that behalf.

ART. XII. The existing by-laws of the Union Pacific Railroad Company are hereby provisionally adopted, and shall apply to the company hereby formed until duly changed or repealed.

ART. XIII. All books, vouchers, records, instruments of title, cash, evidences of debt, contracts, and documents pertaining to the business or property of the said three companies, parties hereto, shall, without delay, be delivered to the proper officers of the consolidated company, and the said books, records, and papers shall be deemed and taken, as far as necessary, as the records and books of said consolidated company; and said books, records, vouchers, and papers shall be subject to the proper examination and inspection of all persons interested therein.

ART. XIV. These articles may be amended and modified from time to time, and in such manner as the holders of two-thirds of the stock of the consolidated company may direct or approve.

ART. XV. This agreement shall be executed on the part of the respective parties hereto by the proper officers, and under the corporate seals of said companies.

In witness whereof, the said parties have caused their respective corporate seals to be hereunto affixed, and the same to be attested by their respective presidents and secretaries, this the 24th day of January, A. D. 1880.

[SEAL.] THE UNION PACIFIC RAILROAD COMPANY,
BY SIDNEY DILLON, *President.*
Attest: HENRY MCFARLAND, *Secretary.*

[SEAL.] THE KANSAS PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*
Attest: A. H. CALEF, *Secretary.*

THE DENVER PACIFIC RAILWAY & TELEGRAPH COMPANY,
[SEAL.] BY D. M. EDGERTON, *President.*
Attest: D. H. MOFFATT, JR., *Acting Secretary.*

The Union Pacific Railway Company has signified, and hereby signifies, its assent to and acceptance of the foregoing articles of union and consolidation, January 24, 1880.

[SEAL.] THE UNION PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*

MEETING OF DIRECTORS.

Meeting of the directors of the Denver Pacific Railway and Tele-

graph Company, held at the company's office in the city of New York, January 24th, 1880, at 78 Broadway at 1 o'clock p. m., of which due notice was given by the secretary to each of the
144 directors by telegraph, and in writing to each and every director of the company.

Present: D. H. Moffat, jr., Sidney Dillon, D. M. Edgerton, W. S. Cheesman, C. S. Greeley, John D. Perry.

Mr. D. H. Moffat, on motion, appointed secretary.

The resignation of Mr. Jay Gould, dated the 10th day of January, as a director of this company, was read, and on motion accepted.

The president of the company read to the board a communication and report, dated January 16th, 1880, from G. M. Dodge and Solon Humphreys, in respect of a proposition to unite and consolidate with the Union Pacific Railroad Company and the Kansas Pacific Railway Company.

The president laid before the meeting for consideration articles of union and consolidation of this company with the Union Pacific Railroad Company and the Kansas Pacific Railway Company, into a new company, to be styled "The Union Pacific Railway Company," which articles were read at length; dated January 24th, 1880; copy annexed.

After consideration, on motion of Mr. D. H. Moffatt, jr., seconded by Mr. W. S. Cheesman, it was voted that the president of this company be directed to execute on behalf of this company the said articles, under the corporate seal, the same to be attested by the secretary of this meeting, and also that the president execute any other necessary papers, contracts and deeds, and do all other acts necessary to carry the same into effect.

Carried unanimously.

On motion of Mr. D. H. Moffatt, jr., seconded by Mr. W. S. Cheesman, it was resolved: That whereas this company has united and consolidated with the Union Pacific Railroad Company and the Kansas Pacific Railway Company, into the Union Pacific Railway Company, that the stock-books be closed.

Carried unanimously.

Adjourned until 4 o'clock p. m. this day, at the same place.

(Signed) D. H. MOFFATT, JR., *Secretary pro tem.*

I do hereby certify that the foregoing is a true and correct copy from the records of the proceedings had at a meeting of the directors of Denver Pacific Railway and Telegraph Company, held on the 24th day of January, A. D. 1880, at 78 Broadway, in the city of New York.

Witness my hand and the seal of the company, this seventeenth day of May, A. D. 1880, at Denver, Colorado.

[OFFICIAL SEAL.] R. R. McCORMICK,

Secretary Denver Pacific Rly. & Tel. Co.

145 ADJOURNED MEETING.

January 24, 1880, 4 o'clock.

Present as before.

Resolved, That the president be authorized to call any special meeting or meetings of the stockholders that may be deemed necessary or desirable to consummate the articles of consolidation.

(Signed) DAVID H. MOFFATT, JR.,
Secretary pro tem.

I do hereby certify that the foregoing is a true and correct copy from the records of the Denver Pacific Railway and Telegraph Company in my office, of a certain resolution adopted by the board of directors of said company, at an adjourned meeting held at 4 o'clock p. m. on the 24th day of January, A. D. 1880, at 78 Broadway, N. Y.

Witness my hand and the seal of the company. Done at Denver, Colorado, this 20th day of May, A. D. 1880.

[OFFICIAL SEAL.] R. R. McCORMICK,
Secretary Denver Pacific Rly. & Tel. Co.

[Copy "C."]

STOCKHOLDERS' RATIFICATION AND APPROVAL.

Know all men by these presents, that we, the undersigned persons and parties holding and representing the shares of the capital stock of the Denver Pacific Railway and Telegraph Company, now issued and outstanding to the extent set forth opposite our respective names, have ratified and approved, and by these presents do ratify and approve the articles of union and consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway, and the Denver Pacific Railway and Telegraph Company, into the Union Pacific Railway Company. Dated the 24th day of January, A. D. 1880, and hereby referred to for greater certainty and made part hereof.

Names.	*Shares.*	*Residence.*
Sidney Dillon,	39,986 (trustee)	N. Y.
D. H. Moffat, jr.,	One,	Denver, Col.
C. S. Greeley,	One,	St. Louis.
W. S. Cheesman,	One,	Denver.
D. M. Edgerton,	One,	St. Louis.
Wm. J. Palmer,	One,	Colorado.
G. M. Dodge,	One,	New York.
Fred'k L. Ames,	One,	No. Easton, Mass.

146 [Copy "D."]

Know all men by these presents, that we, the undersigned persons and parties holding and representing the shares of the capital stock of the Denver Pacific Railway and Telegraph Company, now issued and outstanding to the extent set forth opposite our respective names,

have ratified and approved, and by these presents do ratify and approve the articles of union and consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, into the Union Pacific Railway Company. Dated the 24th day of January, 1880, and hereby referred to for greater certainty, and made part hereof.

Names.	*No. of Shares.*	*Residence.*
John P. Deveraux,	One,	Lawrence, Kas.
Adolphus Meier,	One,	St. Louis, Mo.
Sidney Dillon,	One,	New York.
A. H. Calef,	One,	"
Jay Gould,	One,	"

D. H. Moffatt, jr., being duly sworn, doth depose and say: That he was duly elected vice-president of the Denver Pacific Railway and Telegraph Company, and that his successor has never been chosen, and that he was appointed the acting secretary of the meeting of the directors of said company, hereafter referred to, held on the 24th day of January, 1880; that the printed instrument hereto annexed marked "A," and made part hereof, is a true copy of the original articles of union and consolidation; that the said articles of union and consolidation were submitted to the action of a corporate meeting of the directors of the Denver Pacific Railway and Telegraph Company held January 24th, 1880, at which it was "voted that the president of this company be directed to execute, on behalf of this company, the said articles under its corporate seal, the same to be attested by the secretary of this meeting;" that deponent was the secretary of such meeting, and that the said articles were executed as directed by the said vote. And deponent further states the same have been ratified and approved by the written assent of every shareholder or stockholder in said company; that the instruments hereto annexed, marked respectively "C" and "D," are true copies of the original instruments, and that the same were duly signed by the several shareholders.

DAVID H. MOFFATT, JR.

THE STATE OF NEW YORK, } ss.
City of New York. }

Subscribed and sworn to before me by David H. Moffatt, jr., the 14th day of May, A. D. 1880. Witness my hand and official
147 seal as commissioner of deeds, duly appointed for the state of Colorado, hereto affixed.

[OFFICIAL SEAL.]

A. H. CALEF,
Commissioner of Deeds for state of Colorado.

A. H. CALEF, being duly sworn, doth depose and say: That I know the contents of the foregoing affidavit of David H. Moffatt, jr., and that the same is true; and I do further state that the instruments marked "C" and "D" are true copies of the originals, to my

knowledge, and that the signatures to the originals are genuine, and the persons so signing the same constitute all of the shareholders of the Denver Pacific Railway and Telegraph Company.

A. H. CALEF.

THE STATE OF NEW YORK, *City of New York,* } ss.

Subscribed and sworn to before me this 14th day of May, A. D. 1880. Witness my hand and seal notarial, hereto set the day above written.

[OFFICIAL SEAL.] JAMES M. HAM,
Notary Public, Kings county, N. Y.

Certificate filed in N. Y. county.

I, D. M. Edgerton, the president of the Denver Pacific Railway and Telegraph Company, do hereby certify, and upon oath state that, at a meeting of said company, held January 24, 1880, it was voted by the directors of said company to consolidate with the Union Pacific Railroad Company and the Kansas Pacific Railway Company, and thereby form a new company called the Union Pacific Railway Company; that the printed instrument hereto attached is a true copy of the articles of consolidation, and that the same were signed and executed by order of the board of directors of the said Denver Pacific Railway and Telegraph Company, and attested by the corporate seal of said company; that every shareholder of said company has in writing assented to and ratified in writing the said articles of union and consolidation; that true copies of such written assent and ratification are hereto annexed, marked "C" and "D."

In testimony whereof, I have caused this certificate to be attested by the corporate seal of said company, and have signed the same as the president of said company.

[OFFICIAL SEAL.] D. M. EDGERTON,
President of the Denver Pacific Railway & Telegraph Co.

Attest: R. R. McCORMICK,
Secretary.

THE STATE OF MISSOURI, *City of St. Louis,* } ss.

The foregoing certificate was subscribed and sworn to before me, by the said D. M. Edgerton, this 18th day of May, A. D. 1880.
148 Witness my hand and seal official, hereto affixed the date above written. (My term ends February 18, 1883.)

[OFFICIAL SEAL.] C. D. GREEN, JR.,
Notary Public.

STATE OF COLORADO, *Secretary's office,* } ss.

I, Norman H. Meldrum, secretary of state of the state of Colorado,

do hereby certify that the foregoing is a full, true and complete transcript of the articles of union and consolidation of the Denver Pacific Railway and Telegraph Company, the Union Pacific Railroad Company, and the Kansas Pacific Railway, into the Union Pacific Railway Company, which was filed in this office the second day of August, A. D. 1880, at 2 o'clock 45 minutes p. m., and admitted to record.

In testimony whereof, I have hereunto set my hand and affixed the great seal of state, at the city of Denver, this third day of August, A. D. 1880.

[SEAL.] N. H. MELDRUM,
Secretary of State.

DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY.

DENVER, *September* 30, 1880.

At a meeting of the stockholders of the Denver Pacific Railway and Telegraph Company, held at the office of the Union Pacific Railroad Company, at Denver, Colorado, on the 30th day of September, 1880, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, said meeting being held in pursuance of the call therefor and notice thereof given, as appears by the notice and call for such meeting filed in the office of the secretary of the said Denver Pacific Railway and Telegraph Company, which said notice was in the words and figures following, to wit:

"PUBLIC NOTICE.

"The undersigned, president, directors and stockholders of the Denver Pacific Railway and Telegraph Company, do hereby call a special meeting of the stockholders of said company, to be held at the city of Denver, in the state of Colorado, on the 30th day of September, A. D. 1880, at the office of the Union Pacific Railway Company, in Denver, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, for the purpose of determining by vote of the corporation, through its stockholders, its assent to or dissent from the articles of union and consolidation between the said company, the Kansas Pacific Railway Company, and the Union Pacific Railroad Company, of date January 24, 1880. A copy of said articles of union and consolidation has been duly filed with the secretary of the interior, and with the secretary of state of Colorado, to which reference may be made.

"Said articles of union and consolidation have been approved by the directors of the said Denver Pacific Railway and Telegraph Company at a corporate meeting duly assembled January 4, 1880, and the same have been separately assented to by every stockholder of
149 the said Denver Pacific Railway and Telegraph Company; but it is deemed proper that the said special meeting of the stockholders be called, that such assent be manifested by a recorded vote of the stockholders, at a meeting of the company to be held for that pur-

pose at the city of Denver, on the 30th day of September, A. D. 1880, at the place and between the hours hereinbefore stated.

D. M. EDGERTON,
President Denver Pacific Railway and Telegraph Company.
DAVID H. MOFFATT, JR.,
Vice-President.

Sidney Dillon,	one share,
John P. Devereux,	one share,
C. S. Greeley,	one share,
D. M. Edgerton,	one share,
D. H. Moffatt, jr.,	one share,
Jay Gould,	one share,
Frederick L. Ames,	one share,
W. S. Cheesman,	one share,
Directors of said Company.	
Frederick L. Ames,	one share,
G. M. Dodge,	one share,
A. H. Calef,	two shares,
A. H. Calef, treas.,	two shares,
Jay Gould,	10,001 shares,
D. H. Moffatt, jr.,	one share,
D. M. Edgerton,	one share,
C. S. Greeley,	one share,
John P. Devereux,	one share,
Sidney Dillon,	one share,
Jay Gould and Russell Sage, Trustees,	29,986 shares.
Adolphus Meier,	one share,
W. J. Palmer,	one share,
Stockholders of said Company.	

R. R. McCORMICK, *Secretary.*"

And by the affidavits of Herman Silver and John Brisben Walker, that said notice had been published in the Denver *Daily Tribune* and in the *Inter-Ocean*, which affidavits were in the words and figures following, to wit:

"STATE OF COLORADO, *Arapahoe County*, } *ss.*

"Herman Silver, being first duly sworn, says he is the secretary and treasurer of the Denver *Tribune*, a daily paper published in the city of Denver; that the annexed notice was published in said Denver *Tribune* for thirty consecutive days, excluding Monday of each week; and that the first publication of said notice was on August 6th, 1880, and the last publication was September 5th, 1880.

H. SILVER,
Secretary and Treasurer Tribune Pub. Co.

"Subscribed and sworn to before me this 27th day of September, A. D. 1880.

[SEAL.] CHAS. R. RAYMOND,
Notary Public."

"STATE OF COLORADO, } ss.
County of Arapahoe, }

"John Brisben Walker, being first duly sworn, says he is one of the proprietors of the *Inter-Ocean*, and that the said *Inter-Ocean*
150 is a weekly newspaper, published in the city of Denver, state of Colorado; that the notice hereto annexed was published in said *Inter-Ocean* for four consecutive issues of said *Inter-Ocean*, commencing with August 14th, 1881.

JOHN BRISBEN WALKER.

Sworn and subscribed before me this twenty-seventh day of September, A. D. 1880.

[SEAL.] GABRIELL NETTER,
Notary Public Arapahoe county, Col."

And it further appears by certificate of R. R. McCormick, secretary of said Denver Pacific Railway, and Telegraph Company in words and figures following, to wit:

"I. R. R. McCormick, secretary of the Denver Pacific Railway and Telegraph Company, do hereby certify that at least twenty days prior to the 30th day of September, A. D. 1880, I mailed to each and every of the stockholders of said company printed slips of a notice of the meeting of the stockholders to be held in Denver, the 30th day of September, A. D. 1880, which said notice is the same as that referred to in the affidavit of John B. Walker and Herman Silver, and a copy of the notice signed by the president and directors of said company, calling said meeting; that such notices were sent by mail to the address of said stockholders by depositing the same in the post office and prepaying the postage thereon at Denver City, Col.,"

that notice of such meeting had been sent by mail to all of the stockholders of said company.

The following proceedings were had:

The stockholders assembled at the time and place mentioned, and organized by electing D. H. Moffat, jr., chairman, and R. R. McCormick secretary of said meeting.

The chairman explained the object of the meeting to be to determine by vote of the stockholders of the said Denver Pacific Railway and Telegraph Company their assent to or dissent from the articles of union and consolidation between the Kansas Pacific Railway Company, the Union Pacific Railroad Company, and the Denver Pacific Railway and Telegraph Company, of date January 24th, 1880, a copy of which has been duly filed with the secretary of the interior,

and the original of which was presented to the shareholders as aforesaid.

On motion of Mr. Willard Teller, duly seconded, it was voted that Mr. R. R. McCormick and Mr. E. W. Rollins be appointed tellers, to examine and report to the meeting the names of stockholders present, in person or by proxy, and the number of shares held by them respectively in the said Denver Pacific Railway and Telegraph Company, as shown on the books of the company on the 30th day of September, 1880, and who are entitled to vote at this meeting.

And therefore the said McCormick and Rollins reported that there were then present and entitled to vote, shares of the corporate stock of said company as follows, to wit:

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	Shares.
In person:	
D. H. Moffatt, jr	1
By William Teller, proxy:	
Sidney Dillon	1
Jay Gould	10,000
Jay Gould and Russell Sage, trustees	29,986
G. M. Dodge	1
A. H. Calef	4
C. S. Greeley	1
By E. W. Rollins, proxy:	
Frederick L. Ames	1
John P. Devereux	1
D. M. Edgerton	1
Adolphus Meier	1
Shares	39,999

On motion, the report of the committee was received and adopted.

On motion of Mr. Teller, duly seconded, it was—

Resolved, That the said articles of union and consolidation, dated January 24th, 1880, the original of which has been presented and a copy of which is on file in the office of the secretary of the interior, as above stated, whereby the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company have severally agreed to unite and consolidate into a new company, called and known as The Union Pacific Railway Company, be, and the same are hereby, ratified and approved.

Which resolution was adopted by a vote of the following shares of stock of the said Denver Pacific Railway and Telegraph Company, standing on the books of said company on the 30th day of September, 1880, to wit:

(The chairman appointed R. R. McCormick and E. W. Rollins tellers of election.)

Names.	*Proxies.*	*Number of shares.*
Sidney Dillon	Willard Teller	1
Jay Gould and Russell Sage, trustees	do	29,986
Jay Gould	do	10,001
C. S. Greeley	do	1
G. M. Dodge	do	1
A. H. Calef	do	4
Frederick L. Ames	E. W. Rollins	1
John P. Devereux	do	1
D. M. Edgerton	do	1
Adolphus Meier	do	1
D. H. Moffat, jr		1
		39,999

We, the undersigned, tellers of election, do hereby certify that the vote on the foregoing resolution was: For adoption, 30,999 shares; against adoption, none.

(Signed) E. W. ROLLINS.
R. R. McCORMICK.

152 Whereupon the chairman declared said resolution adopted, and ordered the same to be recorded.

Resolved, That the secretary of this meeting be, and he is hereby, instructed to furnish the president of the consolidated companies, Union Pacific Railway, a certified copy of the proceedings of this meeting.

On motion, the meeting adjourned *sine die*.

I, R. R. McCormick, secretary of the Denver Pacific Railway and Telegraph Company, do hereby certify that the above and foregoing is a true and correct copy from the records of the proceedings had at the meeting of the stockholders of the said railway and telegraph company, held in the city of Dever, state of Colorado, on the 30th day of September, A. D. 1880.

Witness my hand and the seal of the said railway and telegraph company this 20th day of October, A. D. 1880.

R. R. McCORMICK,
Secretary of Denver Pacific Railway and Telegraph Company.

G.

PROCEEDINGS OF THE KANSAS LEGISLATURE IN 1881, WITH REFERENCE TO THE CONSOLIDATION.

In 1881 the judiciary committee of the senate of Kansas investigated the question of the validity of the consolidation hereinbefore set out at length. The resolution authorizing such investigation, and the conclusion arrived at by the majority and minority of the

committee, are herewith given for the purpose of making the history of this question complete. The majority report, written by the Hon. H. C. Sluss, one of the ablest lawyers in Kansas, finds that the consolidation is valid, and is of itself an unanswerable argument in favor of its validity. The minority report, written by Hon. S. O. Thacher, also a very able lawyer, contains the views of those who deny the validity of the consolidation, and has already been answered in the argument of this case.

AMENDMENT TO HOUSE CONCURRENT RESOLUTION NO. 21, AS RECOMMENDED BY THE COMMITTEE.

Whereas, The Kansas Pacific Railway Company, a railroad corporation created and organized under the laws of the territory of Kansas, known at the time of its organization as the Leavenworth, Pawnee & Western, and subsequently as the Kansas Pacific, eastern division, and still later as the Union Pacific, Kansas division, and the Union Pacific Railroad Company, created under the act of Congress, have heretofore attempted a consolidation, and pursuant to said attempted consolidation the Kansas Pacific Railway Company has ceased to do business as a railroad company, and the consolidated company, under the name of the Union Pacific Railroad Company, is now exercising all the franchises, privileges, and immunities of the Kansas Pacific Railway Company, and has removed from the state all of its general offices, all of which acts are believed to be in disregard to the laws of the state of Kansas, and to the end that the law may be enforced— 153

Resolved by the House of Representatives, the Senate concurring therein:

First. That the attorney general be directed to examine into the alleged consolidation of the Union Pacific Railroad Company with the Kansas Pacific Railway Company, and ascertain its terms and conditions, and state whether the consolidated company has been legally formed under the laws of this state, or any law paramount to the laws of this state.

Second. That he state whether in his opinion the consolidated company is amenable to the laws of this state; if so, to what extent, and in what particulars.

Third. That he state whether in his opinion the said Union Pacific Railroad Company has usurped rights and franchises, or is exercising corporate rights and franchises in this state not authorized by law, or has in any manner failed to comply with or has violated any laws of this state; if so, in what respect.

Fourth. That he state whether in his opinion the Kansas Pacific Railway Company is in law an existing corporation of this state, or whether it has become an extinct corporation and the state has lost jurisdiction over the property once belonging to said corporation. If he state that it has lost such jurisdiction, he must state how and in what manner that end has been reached.

Fifth. That he state what remedies are left to the state in respect to each of the matters above referred to.

Sixth. That he also state what will be the probable expense to the state for counsel in case actions are instituted in the above matters by the state.

Seventh. That he make such report within a reasonable time, not to exceed three months from this date, and file the same with the governor of the state, who shall transmit the same with his message to the next legislature. Nothing herein shall prevent the publication in the newspapers of the state of said report as soon as made.

154 MAJORITY REPORT OF SENATE COMMITTEE ON HOUSE CONCURRENT RESOLUTION NO. 21.

Mr. PRESIDENT: The majority of the committee on judiciary beg leave to say:

That the purpose of this resolution is to cause an action to be prosecuted by the state against the Kansas Pacific Railway Company, based upon the fact that said railway company has voluntarily become consolidated with the Union Pacific Railroad Company, and become a part of the Union Pacific Railroad. The question of the adoption of this course by the state involves two very important considerations: First, Have we a clear case? Second, Is it sound policy to prosecute it?

It is not proposed to institute this suit by reason of any refusal of either the original or consolidated railroad company to submit to any reasonable regulation of law, but solely on account of said consolidation. We are prepared to believe that the people of Kansas do not desire to engage in litigation with any of its great lines of railway, unless the state is clearly in the right, both in law and in equity, and the real interests of the people of the state render such course reasonably necessary.

The questions of law and fact arising in such litigation must be decided by a court of justice, composed of judges supposed to be entirely impartial and uninfluenced by any wave of public clamor, and fearless of that shadowy something popularly styled "the growing power of corporations." The examination which we have been able to give the subject shows us that the foundation of what is known as the Kansas Pacific Railway, was the "Leavenworth, Pawnee & Western Railroad Company," the charter of which was originally granted by a legislature of the territory of Kansas, at a session held in the year 1855, and authorized the building of a railroad from the city of Leavenworth, by the way of Pawnee, to the western limit of the then territory, under which charter it appears an organization was perfected in January, 1857.

Under its charter the company was given unlimited authority to receive loans and donations of land from the United States to aid in the construction of the proposed line of railway.

On the first day of July, 1862, an act of Congress was approved,

creating the Union Pacific Railroad Company, and authorizing the construction of a system of railways from the Missouri river to the Pacific ocean, and making valuable loans and grants of land to the several companies by the act authorized to participate in building said system of railways.

Among the provisions of that act was one to the effect "that the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the
155 south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the hundredth meridian of longitude west from Greenwich as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned (meaning the Union Pacific Railroad Company.")

The act of Congress contained the further provision, "That at any time after the passage of this act all of the railroad companies named herein and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company."

Afterwards an amendatory act was passed by Congress, approved July 2d, 1864, containing further and fuller provisions for the construction of said system of railways.

This latter act gave to the Leavenworth, Pawnee & Western Railroad Company additional and valuable rights and privileges, and also prescribed the course of a portion of its route, so as to compel its building by the way of Lawrence and Topeka; and among other things, provided—

"That any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act, or the laws of the state or states in which the roads of such companies may be, and assume and adopt such corporate name and style as they may agree upon."

The Leavenworth, Pawnee & Western Railroad Company accepted all the loans, gifts and grants which our government gave it by these acts of Congress, and was thereby, and only thereby, enabled to build and complete the road. In other words, the government of the United States built and completed the great work which it is now proposed the state of Kansas, which did not build it, shall raise its battle-ax and chop in pieces.

It ought to be a sufficient answer to the real controversy now before us to ask, Who ought in justice and fairness to have primary and supreme control of the agents intrusted with the management of this national highway—the government of the Nation which built it, or the state of Kansas, which sat in its infancy and implored the government to open its treasury, extend its credit, and divide its do-

main for the building of this highway, in order that Kansas might become a great state?

But, however this may be, it is certainly true that the consolidation now sought to be attacked was expressly authorized by the act of Congress.

But the question arises—and it is the only question—had Congress the power to authorize this consolidation?

We are clearly of the opinion that it had. In our judgment, it derives this power from the provision of the federal constitution
delegating to Congress power to regulate commerce among
156 the states. It is not our purpose, nor do we conceive it to be our duty, to enter into a labored argument to sustain this opinion.

It is clearly settled that Congress has power to create a corporation when it is an appropriate means of exercising any of the powers given by the constitution to the government. Within the sphere of any distinct power given by the constitution, the authority of Congress is supreme.

Congress is given power to regulate commerce among the states. A railway corporation may be made an appropriate instrument of commerce among the states. The creation of a railway corporation, and providing for the construction of a railroad, is an appropriate means of exercising the power to regulate commerce among the states.

But we cannot better or more forcibly express our views upon this important question than by incorporating the words of that eminent jurist, Mr. Justice Miller, of the Supreme Court of the United States. He says:

"The power to regulate commerce is the power to regulate the instruments of commerce. In the case of *Cooley* v. *The Board of Wardens*, the court says, that 'the power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used.' Navigation is here spoken of as one of the subjects of legislation included in the power to regulate commerce. In this view of the subject, Congress has passed statutes regulating steamboats, their construction, equipment, officers and crews, prescribing qualifications of pilots and engineers, limiting the number of passengers they must carry, and prescribing the signals they shall use in passing each other; in short, it has established a minute code for building and navigating those vessels. The right to do this depends wholly on the power vested in Congress to regulate commerce, and has never been disputed.

"Navigation, however, is only one of the elements of commerce. It is an element of commerce because it affords the means of transporting passengers and merchandise, the interchange of which is commerce itself. Any other mode of effecting this would be as much an element of commerce as navigation. When this transportation or interchange of commodities is carried on by land, it is

commerce, as well as when it is carried on by water; and the power of Congress to regulate it is as ample in the one case as in the other. The 'commerce among the states,' spoken of in the constitution, must, at the time that instrument was adopted, have been mainly of this character; for the steamboat, which has created our great internal commerce on the rivers, was then unknown.

"Another means of transportation, equal in importance to the steamboat, has also come into exercise since the constitution was adopted. By it merchandise is transported across states and kingdoms in the same vehicle in which it started. The railroad now shares with the steamboat the monopoly of the carrying trade. The one has, with great benefit, been subjected to the control of salutary congressional legislation. Is there any reason why the other should not be? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a state, and which is therefore neither foreign commerce nor commerce among the states, it seems to me that when these roads become parts of the great highways of our Union, acting an important part in a commerce which embraces many states, and destined, as some of these roads are, to become the channels through which the nations of Europe
157 and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce both with foreign nations and among the states, and that to refuse to do this is a refusal to discharge one of the most important duties of the federal government. As already intimated, the shackles with which the different states fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the federal government, has justified the wisdom of our fathers. But are we to remit the most valuable part of it to the control of the states through whose territories it must be conducted, and to all the vexations and burdens which they may impose? And must all this be permitted because the carrying is done by a method not thought of when the constitution was framed?

"For myself, I must say that I have no doubt of the right of Congress to prescribe all needful and proper regulations for the conduct of this immense traffic, over any railroad which has voluntarily become part of any of those lines of interstate communication, or to authorize the creation of such roads, when the purposes of interstate transportation of persons and property justify or require it."

Then, if Congress has power to create a railway corporation as an instrument of commerce among the states, which Judge Miller expressly affirms, how can it be said that it may not set the seal of its power upon existing railway corporations to accomplish the same end? If Congress may authorize the consolidation of the property and capital of individuals (which is the real effect of organizing a corporation) as an instrument or means of interstate commerce, on

the same ground it may authorize the consolidation of the property and capital of existing corporations (which are but several aggregations of the property and capital of individuals) for the same purpose.

But this is not all. If we authorized the proposed action to be instituted, we shall be met in its prosecution by many other serious questions, among which we mention the following:

As we have said, the act of the territorial legislature incorporating the Leavenworth, Pawnee & Western Railroad Company contained the provision that the company might accept and hold loans, gifts, grants and donations of land, money or bonds, in any quantity, from the United States. The act nowhere contained any provision limiting or prescribing the terms or conditions on which the company might accept such loans, gifts or donations from the United States. The company was, therefore, impliedly authorized to accept such loans, gifts and donations, upon such terms and conditions and for such purposes as Congress might prescribe, and to submit to such regulations and accept such powers as Congress might impose, in order to effectuate the object it should have in view in making such loans, gifts and donations on behalf of the United States.

Who can say Congress would have made the gifts and donations it did if the charter had contained provisions preventing Congress taking control of the operations, as well as the destiny of the road? Is it to be said that Congress had not the power to require
158 the road to be built from Kansas City, instead of from Leavenworth? Or by Lawrence and Topeka, instead of miles away from them? We have not heard it so said. Then, we say, it becomes a serious question if these things, including the condition that all these corporations might be consolidated into one as a more efficient instrument of interstate commerce, to secure which was the object of the action of Congress, do not constitute a condition on which Congress and the company have acted, entering into the compact, and which the state cannot annul, if it so desired.

Again: Prior to the passage of the act of Congress, the act of March 5, 1862, was passed by the legislature of Kansas. The language of that act is peculiar and significant. It provided that "Any railroad company now organized, or which shall hereafter organize under the laws of Kansas, may, at any meeting regularly called of all the stockholders thereof, by vote of persons holding a majority of the stock of such company, unite or consolidate it with any other company or companies now organized, or which may hereafter organize under laws of the United States, or any state or territory;" and further provided "that any companies thus united for the purpose of the construction of a railroad and branches thereof, from the western boundary of the state of Missouri to the Pacific ocean, shall, upon equal terms, have the right to run through cars upon said Pacific Railroad as far and as fast as the same is completed from the points on the Missouri river from which said roads or branches shall start." When it is remembered that this act was passed at the

very time time when the Pacific Railroad act was pending and under discussion in Congress, and at a time when there was no railroad company in existence organized under the laws of the United States, and no company formed to construct a railroad from the western boundary of Missouri to the Pacific ocean, the conclusion is irresistible that it was passed in anticipation that the act of Congress should provide authority for the consolidation of these several companies; and more than all, that this very provision authorizing such consolidation was considered by Congress as a vital condition upon which the grants of subsidy to aid in building the road should be made. The act of March 5, 1862, may therefore be considered as a valid grant of the consent of the state to Congress to provide for the consolidation, and to the company to make such consolidation. That the consideration to the state for giving such consent was sufficient and ample, there can be no question. Such consent being thus given upon sufficient consideration, and being accepted and acted upon by Congress in granting the subsidy, and by the company in accepting the grant, and entering upon building the road, it becomes a serious question whether the state is not prohibited from withdrawing that consent, under the provision of the federal constitution which declares that no state shall pass any law impairing the
159 obligation of contracts. There is strong reason as well as judicial authority for saying it cannot be done.

The repeal of the act of March 5, 1862, therefore, did not affect the power of the company to enter into the consolidation. Upon the question of policy involved in the passage of this resolution, we do not suppose it was expected of this committee to express an opinion. It is urged that by the consolidation the company has attempted to place itself beyond the jurisdiction of the legislature and courts of our state. However this may be, it is apparent that the consolidation, being the creature of the law, can contain no stipulation or provision inconsistent with the provisions of the law by which it is authorized, and any such stipulations contained in the articles of consolidation cannot be successfully pleaded either in resistance to any law of the state, or the jurisdiction of our courts. It has been repeatedly held by the Supreme Court of the United States, that where two or more corporations organized under the laws of different states are consolidatod into one company, such consolidated company has all the rights and becomes subject to all the liabilities held by the original companies in the respective states under the laws of which they were organized. If the company has passed beyond the jurisdiction of the legislature and the courts of Kansas, it is by reason of the fact of such consolidation, and not by reason of the presence or absence of provisions to that effect in the articles of consolidation, and the same would result by reason of the fact of the company being an instrument and means of interstate commerce. It is then more reasonable to suppose that any provisions of the kind referred to cannot be enforced, than that the consolidation is rendered void *in toto* by reason of such provisions. We are of the

opinion that there can be no practical advantage result to the state of Kansas in having it adjudged that the Kansas Pacific Railway Company has forfeited its charter, and maintain that it would be better to treat the company as a citizen of this state and enforce obedience to our laws. If in fact and law it is a citizen, we can compel obedience to our laws. If it is not, then we certainly cannot succeed in the proceeding contemplated by this resolution.

It is well known that it has been the settled policy of the state to encourage and if possible secure the end which at last has been brought about by means of this consolidation, so that the products of Kansas might be placed in the markets of the west on terms to compete with the producers of Iowa, Nebraska, and northern Missouri. This result having been attained in the only practical way in which it could be permanently attained, shall the state now turn about and say, We want and will have separate and dissevered lines of railway under different management, and charging different and independent rates for the transportation of our products to the doors of the consumers in the vast region occupying the western half of the continent?

160 For the reason that the step proposed by this resolution is one of serious consequence, and should not be taken except upon the most satisfactory showing of law and fact and justice in its favor, we believe a thorough and impartial investigation should be made by the attorney general into all the questions involved, and that action be taken only after a thorough understanding of our rights and duties in the premises. To this end, therefore, we recommend that the accompanying substitute be adopted.

Respectfully submitted.

H. C. SLUSS,
W. B. GLASSE,
W. P. HACKNEY,
A. L. PATCHIN,
AARON S. EVEREST,
Of the Senate Committee on Judiciary.

MINORITY REPORT OF SENATE COMMITTEE ON HOUSE CONCURRENT RESOLUTION NO. 21.

Mr. PRESIDENT: Your committee have had under consideration house concurrent resolution No. 21, relating to a *quo warranto* action against certain railroad companies therein named.

At the hearing of the same, your committee was attended by Hon. J. P. Usher and Hon. A. L. Williams, attorneys for said companies, as well as by the managing officers of the Union Pacific Railway Company, and have had the benefit of a very full and able argument by its counsel. While counsel were not concordant as to the manner or steps whereby the Kansas Pacific Railway Company has become extinct as a corporation of this state, and its property and rights merged in the Union Pacific Railway Company, yet both arrived at

the conclusion that such extinction had taken place, and that where the state once had a corporation obedient to its laws and possessed of a vast prosperity, it now had nothing, and that this corporation was now consolidated with the corporation known as the Union Pacific Railway Co., and over which the state has no power, save a sort of police power, and that this consolidated corporation owed no rights or duties to the state, save such as flow from the acts of Congress, approved respectively July 1, 1862, and July 20, 1864; and counsel strenuously maintained that the jurisdiction of the state through its courts and laws over the property and rights once pertaining to the Kansas Pacific Railway Co., are now only such as the requirements of said acts of Congress permit. This conclusion and argument, pressed upon your committee with great earnestness and marked research and ability, has led your committee to give the momentous proposition as much time and thought as was at its disposal.

The proposition of the companies involves far-reaching
161 consequences to the state, and affects its dignity and sovereignty in so vital a particular that, being conceded, no limit can be found to the removal of any corporation of the kind mentioned beyond the control of the power that called it into being. Such a result may well excite the gravest apprehensions.

In the argument before the committee this conclusion was advanced by the respective counsel for the companies on two separate grounds, the one insisting that the state had, by its acts, assented to it, while the other distinctly maintained the result to have been reached by the supreme power vested in Congress to authorize it independent of any state act whatsoever. It is necessary to consider each proposition. The first, if correct, is the one most consonant with the self-respect and dignity of the state. To substantiate it, it was maintained that certain concurrent resolutions of the state legislature at different times, asking Congress to push forward the building of the Kansas Pacific road, afford evidence that the state is reasonably pledged to permit the consolidation of its own corporation with that created by Congress to the extinction and the withdrawal of its property from state power and control. An examination of each and all of these resolutions, as presented to your committee, falls far short of bringing your committee to the claimed result. Even could the state be bound by a concurrent resolution of its legislature—and counsel for the companies freely conceded it could not, save possibly in an equitable sense—yet none of the resolutions in the remotest degree show or evince any thought in the legislative mind on the point involved. The surrender of state authority over millions of property created under its sanction and encouragement and protection, cannot be so affirmed from anything less than the most explicit and distinct legislative action to that effect. On such a question the will of the law-making power must be so clearly expressed that no room is left for doubt. Indeed, it does not seem to your committee that the legislature is clothed with any such power as is claimed. If it can consent to surrender its authority over a

strip of land from the eastern border to the west line of the state, covered with the most valuable improvements of the age, whose creation and use is absolutely essential to the welfare of the people on each side thereof for a distance of many miles, what limit shall be found to its power at last to turn over to a foreign jurisdiction all the appliances for the use of trade and transportation of products within the state? It is establishing in our midst an *imperium in imperio*, which your committee believe to be alike repugnant to our constitution and state integrity.

Your committee need not here dwell upon a well-known fact as to concurrent resolutions of the legislature of the kind before us—that often they are passed at the request of parties interested—and that the first of the series now referred to was, as averred by counsel, passed at the solicitation of Judge Thomas Ewing, jr., then a prominent member of the Kansas Pacific Railway Company. On
162 this point, then, your committee concludes that the concurrent resolutions referred to have not the effect either in law or in good conscience to bind the state to the conclusion claimed.

Some stress in the argument was laid upon the fact that in 1862 a law of this state was in force that might have authorized such a consolidation as the one under consideration, but as it was also admitted that this law was subsequently, and long before the consolidation took effect, repealed, and that the laws of the state existing at the time of the attempted consolidation did not in terms authorize it, it is hardly necessary for your committee to pursue that part of the question farther, save only to observe that beyond doubt the laws of the state did not only not authorize the arrangement between the two companies, but clearly forbade it.

Passing to the advanced position taken by the other counsel in behalf of the companies named, that Congress could in its pleasure authorize this consolidation, or, indeed, any other, so that at the last there should be under the one company a line or lines of railroad, taken from corporations created solely by state authority, from the Atlantic to the Pacific, your committee can only say that the proposition seems to be one not yet at all affirmed by any authority cited to the committee, but as to the case now in hand it does not appear that Congress has as yet attempted anything of the kind. The Pacific Railroad acts plainly show that Congress intended only to create a corporation to build a railroad through the territories of the United States, but that when the line of this road should touch the states of the Union then it would aid corporations created by the states to extend the projected lines, but nowhere is the right of Congress hinted at to remove these state corporations from the jurisdiction of the states. The distinction is shown with great clearness by Chief Justice Chase, in *Thompson* v. *Railroad Companies*, 9 Wall., 579. The section of the act of Congress which is claimed as authorizing this consolidation in unequivocal terms, declares it can only be done in a manner "not incompatible with the laws of the state" in which the road may be. The consolidation is not only not compatible with

the laws of Kansas, but in direct antagonism thereto in several respects, to wit:

First. It is repugnant to the general office law of the state passed in 1874, being chapter three of the session laws passed at the special session.

Second. It is not at all sanctioned by the law of this state authorizing certain railroads to consolidate, neither of the consolidating roads being within the classes therein mentioned.

Third. It plainly violates section sixteen of the charter of the Kansas Pacific Railway Company. This section is as follows:

"SEC. 16. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the state or states through which the said road shall pass shall
163 be at liberty to purchase said road, by paying to said company the amount at which it shall be valued at by persons mutually chosen by the state and by said company, but two years' notice shall be given said company of the intention of the state to purchase said railroad."

That this section was considered by the company in full force, and a vital one to the extent of preventing the taxing powers of the state, is manifest from the decision in the case of *Thompson* v. *Railroad Companies.* It is evident that Congress does not intend to override this provision in the charter of the Kansas Pacific Company by any act it might pass.

Your committee, without further examination, unhesitatingly arrives at the conclusion that the consolidation attempted is not authorized by law; that it derogates from the dignity of the state, and attempts to deprive it of its conceded prerogatives over the Kansas Pacific Railway as an institution created under the laws of the state. But it is said, what if all this is true—how does it really concern the state? Much, every way.

1st. The articles of consolidation expressly provide for the removal of actions brought against the consolidated company from our state to the federal courts, thereby greatly increasing the expenses of the people who have differences with the company, and besides submitting their disputes to a tribunal much further removed from the people than their own state courts, and this tribunal one that does not follow the decisions of our own state courts, unless satisfied therewith, in a large number of cases.

2d. Moreover, all questions of taxation of the property of this company will be settled in the federal courts rather than our own, whenever the company become dissatisfied with the action of our assessing tribunals.

3d. The right of the state to determine the question of charges by the company for services rendered the people of this state is completely destroyed by the consolidation, and while the visitorial power of the creator of every corporation is in this manner surrendered by the state to Congress.

4th. And beyond all this is the consideration that the state ought

to exact obedience to its laws from the powerful and wealthy as well as the weak and unknown citizen.

The foregoing presents the views of only a part of the committee —others differ from us. The matters involved are of the highest moment to the state, and those of us who agree in the above reasoning are desirous that the fullest and most careful investigation should be given to the questions presented, and hence have agreed with the majority of the committee in presenting the substitute for the house concurrent resolution.

S. O. THATCHER.
R. W. BLUE.
CASE BRODERICK.

164 And afterward, on the 2d day of November, A. D. 1883, there was filed in the office of the clerk of the Supreme Court of the state of Kansas, a petition and bond for removal, which is in words and figures as follows, to wit:

165 In the Supreme Court, state of Kansas.

The State of Kansas ex rel. W. A. Johnson, as attorney general, plaintiff,
vs.
The Kansas Pacific Railway Company, defendant. } No. 2969.

To the Honorable the Supreme Court of the state of Kansas:

Your petitioner, the Kansas Pacific Railway Company, the defendant herein, presents this its petition for the removal of this suit into the Circuit Court of the United States for the district of Kansas, and respectfully shows and states to this honorable court as follows, to wit:

I. That this is a suit of a civil nature, commenced in and now pending in this honorable court, and that the amount in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars; and that the same is a suit arising under the constitution and under laws of the United States, to wit, under an act of Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1st, 1862, and various acts of Congress amendatory thereof and supplemental thereto; and that its decision involves the true and correct construction of the said constitution and laws of the United States, and the
166 rights, titles and obligations of your petitioner thereunder, and that this application is made before or at the term at which said cause could be first tried, and before the trial thereof.

II. Your petitioner further states that it was at the time of the commencement of this suit and now is a corporation other than a banking corporation, organized and existing under the laws of the United States, to wit, under the aforesaid act of Congress, approved

July 1st, 1862, above referred to, and the various acts of Congress amendatory thereof and supplemental thereto. That this suit is a suit commenced in this court, to wit, the Supreme Court of the state of Kansas, being a court other than a circuit or district court of the United States, against your petitioner as such corporation; and is for an alleged liability of your petitioner as such corporation; and that your petitioner has a defense to this suit and the cause of action of the plaintiff herein, and as against the said plaintiff, arising under the constitution and under a law of the United States, to wit, said acts of Congress hereinbefore referred to; and that said defense involves the true and correct construction of the said constitution and the said law of the United States, to wit, said acts of Congress before referred to and the various acts of Congress amendatory thereof and supplemental thereto, and of the rights, titles and obligations of your petitioner under and by virtue thereof; and that the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars. Your petitioner states that this suit has not been tried, but is now pending for trial in this honorable court.

III. Your petitioner now, at the time of filing this its petition, and in this court, offers good and sufficient surety for its entering in the Circuit Court of the United States for the district of Kansas, on the first day of its now next session, copies of all process against it, and all pleadings, depositions, testimony and other proceedings in this cause, and also for its there appearing and entering special bail in the cause or suit, if special bail was originally requisite therein; and your petitioner makes and files herewith a bond
167 with good and sufficient surety for its entering in such Circuit Court on the first day of its now next session a copy of the record in this suit and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto; and also for its there appearing and entering special bail in this suit, if special bail was originally requisite therein. Wherefore your petitioner prays this honorable court to accept this, its petition, and the said surety or bond, and to proceed no further in this suit.

THE KANSAS PACIFIC RAILWAY COMPANY,
[SEAL.] By SIDNEY DILLON,
President.

STATE OF NEW YORK,
City and county of New York, } *ss.*

SIDNEY DILLON, being duly sworn, says: That he is the president of the above-named petitioner and defendant, the Kansas Pacific Railway Company; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

SIDNEY DILLON.

Sworn to before me this 28th day of September, 1883.
[SEAL.] EDWARD CANFIELD,
Notary Public, N. Y. City and Co.

Filed Nov. 2, 1883.

C. J. BROWN,
Clerk Supreme Court.

THE STATE OF KANSAS, } *ss.*
Supreme Court, }

I, C. J. Brown, clerk of the Supreme Court of the state of Kansas, do hereby certify that the above and foregoing is a true copy of the petition for removal in the cause above-entitled, as filed in my office on the 2d day of November, 1883.

Witness my hand and official seal affixed hereto at my office in Topeka, this day of , 188 .
[SEAL.

Clerk Supreme Court.

168 Know all men by these presents, that we, the Kansas Pacific Railway Company, as principal, and John R. Mulvane and Byron Roberts as sureties, are hereby held and firmly bound unto the state of Kansas, or whom it may concern, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, representatives, successor, successors and assigns, firmly by these presents.

The condition of this obligation is such, that if the Kansas Pacific Railway Company shall enter and file, or cause to be entered and filed in the Circuit Court of the United States for the district of Kansas, on the first day of its next session, copies of all process against it, and of all pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the Supreme Court of the state of Kansas, wherein the state of Kansas, on the relation of the attorney general, is plaintiff, and said Kansas Pacific Railway Company is defendant, and shall in said Circuit Court then appear and enter special bail in said cause or action, if special bail was originally requisite therein, and shall do such other proper acts as by the act or acts of Congress in that behalf are required to be done, upon the removal of said suit or cause from the said state court; and upon the further condition, namely, if the said the Kansas Pacific Railway Company shall enter in the said Circuit Court of the United States, on the first day of its now next session, a copy of the record in said suit, and shall well and truly pay all the costs that may be awarded by the said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in the said suit, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals and the corporate seal of said company, this 28th day of September, A. D. 1883.

THE KANSAS PACIFIC RAILWAY COMPANY,
[SEAL.] By SIDNEY DILLON, *President.*
[SEAL.] JOHN. R. MULVANE.
[SEAL.] BYRON ROBERTS.

169 THE STATE OF KANSAS, } *ss.*
Shawnee county, }

John R. Mulvane and Byron Roberts, being duly sworn, severally say, each for himself, that he is worth five thousand dollars over and above all debts, liabilities and exemptions.

JOHN R. MULVANE.
BYRON ROBERTS.

Subscribed and sworn to before me, this 31st day of October, 1883.

J. W. THURSTON,
Notary Public.

Com. expires Dec. 5, 1885. [SEAL.]

[Indorsed:] Approved and filed Nov. 2, 1883. C. J. Brown, clerk of supreme court. In Supreme Court of Kansas. The State of Kansas *ex rel.*, etc., *vs.* The Kansas Pacific Railway Company. Bond.

THE STATE OF KANSAS, } *ss.*
Supreme Court, }

I, C. J. Brown, clerk of the Supreme Court of the state of Kansas, do hereby certify that the above and foregoing is a true copy of the bond for removal in the cause above entitled, as filed in my office on the 2d day of November, 1883.

[SEAL.] Witness my hand and official seal affixed hereto, at my office in Topeka, this day of 188 .

Clerk of Supreme Court.
By W. E. STERNE, *Deputy.*

170 And afterwards, on the 7th day of November, A. D. 1883, there was filed in the office of the clerk of the Supreme Court of the state of Kansas, the petition of George G. Haven *et al.*, to be made parties defendant, which petition is in words and figures as follows, to wit:

171 In the Supreme Court of the state of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
vs.
The Kansas Pacific Railway Company, defendant. } No. 2969.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff,
vs.
F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the board of directors of the Union Pacific Railway Company, defendants. } No. 2970.

Now come George G. Haven, Isaac H. Bromley, Watson Parrish, Arthur L. Conger and Colgate Hoyt, by Wager Swayne, they attorney, and respectfully show unto the court:

1. There is now pending in this honorable court a civil action entitled "The State of Kansas *ex rel.* W. A. Johnson, as attorney general, plaintiff, *vs.* The Kansas Pacific Railway Company, defendant," for the purpose of declaring forfeited the charter of the Kansas Pacific Railway Company, for various reasons therein stated, which petition filed by the attorney general in said cause, your petitioners pray may be considererd as part of this petition, and a copy of the same is herewith shown as part of this their petition.

172 2. There is also pending in this honorable court a civil action above entitled, instituted by the state of Kansas, on the relation of its attorney general, against F. L. Ames and the other persons therein named, who are therein alleged to call themselves the board of directors of the Union Pacific Railway Company. The said petition alleges that the said Ames and other persons therein named, calling themselves the board of directors of the Union Pacific Railway Company, do now, and have since January 24, 1880, used and still do use without any warrant, charter or grant, the following liberties, privileges and franchises, viz.. that of being a railroad company, to use, operate and enjoy, and to receive the tolls, issues, profits and benefits derived from the operation and use of the Kansas Pacific Railroad, being a line of railroad beginning at Leavenworth, in the state of Kansas, and extending in a general westerly direction, by the way of the Fort Riley military reservation, to the city of Denver in Colorado, and beginning at the state line of Kansas, at a point near the junction of the Missouri and Kansas rivers, and running west to a junction with said line, at a point near the city of Lawrence, Kansas; which said liberties, privileges and franchises, it is therein alleged, the said defendants, calling themselves the board of directors of the Union

Pacific Railway Company, during all the time aforesaid, have usurped and still do usurp upon the said state, to her great damage and prejudice.

3. The said Haven states that he is, and was at the time of the commencement of these actions, a citizen of the state of New York; the said Hoyt states that he is, and was at the time of the commencement of these actions, a citizen of the state of New York; the said Bromley states that he is, and was at the time of the commencement of these actions, a citizen of the state of Connecticut; the said Parrish states that he is, and was at the time of the commencement of these actions, a citizen of the state of Nebraska; and the said Conger states that he is, and was at the time of the commencement of these actions, a citizen of the state of Ohio.

4. That the said Kansas Pacific Railway Company has
173 filed an answer in this honorable court to the petition in the said cause.

5. That in the said suit of the state of Kansas, on the relation of its attorney general, against the said Ames and others, calling themselves the board of directors of the Pacific Railway Company, the said defendants have filed an answer in this cause.

7. Your petitioners say that the object of the said suit against the Kansas Pacific Railway Company is to have a judgment that the said Kansas Pacific Railway Company has forfeited all its rights, liberties, and franchises, and that it be ousted from the same, and that the said corporation be thereupon dissolved.

7. Your petitioners say that the object of the suit against the said Ames and the other persons specified in the petition in the said cause, is to have a judgment that the said Ames and others, constituting the members of the board of directors of the Union Pacific Railway Company, appointed and elected by the stockholders thereof, have no right, liberty, privilege, or franchise to operate and use the road originally built by the Kansas Pacific Railway Company, and that they be ousted from the use, enjoyment and exercise of the right, liberty, privilege or franchises of using and operating the same.

8. Your petitioners state that it is untruly alleged in the said petition of the state of Kansas, on the relation of its attorney general, against the said Ames and others named therein, that they do call themselves and are the board of directors of the Union Pacific Railway Company, and as such claim to have, use and enjoy the liberty, privilege and franchise in the said petition mentioned. On the contrary thereof, your petitioners give the court to see and understand and be informed that the said Ames and the other persons specified in the said petition of the state of Kansas, are and claim to be only *part* of the board of directors of the Union Pacific Railway Company; that the said Ames, and the other persons specified therein, are those members of the board of directors of the Union Pacific Railway Company who are elected by the
174 stockholders. Your petitioners state that in addition to the said directors thus elected and appointed by the company,

the acts of Congress (act of July 2, 1864, section 13) provide that the President shall appoint five additional directors, who shall not be stockholders (act of July 1, 1862, section 1), and that at least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The act of 1864, section 13, prescribes the duties of said government directors. Each of the petitioners states that he has been appointed conformably to the said act by the President of the United States, a government director in the Union Pacific Railway Company, and has duly qualified, and is now acting as such in conjunction with the persons named in the answer of the said Ames and others filed herein, and that together with such other persons, your petitioners constitute the board of directors of the Union Pacific Railway Company.

Your petitioners state that the acts of Congress of the United States applicable to the Union Pacific Railway Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company, authorize said companies to consolidate; and that the said companies claim to have so consolidated in strict conformity with the said acts of the Congress and of law, on or about the 24th day of January, 1880, as is more fully set forth in the answers of the Kansas Pacific Railway Company, and of the said Ames, and others, filed respectively in the causes aforesaid.

Your petitioners state that they are specially appointed to protect the interests of the United States in respect of the said consolidated company, including the railroad and properties which the said consolidated company acquired from the said Kansas Pacific Railway Company. That the said Kansas Pacific Railway Company is indebted for subsidy bonds received from the United States and under the provisions of the said acts of Congress, in a sum now amounting with interest to more than twelve million ($12,000,000) dollars,
and which at the time said debt will mature, will amount to a
175 very much larger sum. That this debt is a second lien on
the road of the said Kansas Pacific Railway Co. in aid of which the said subsidy bonds were granted. That it is the duty of the said consolidated company to discharge all of the obligations and to perform all the duties of the said Kansas Pacific Railway Company under the said act of Congress towards the United States, and to pay the said subsidy bonds at maturity, and to keep said railroad in repair, and to use the same for the purpose of transporting at all times, mails, troops, munitions of war, supplies and public stores, whenever required to do so by any department of the government; and to apply toward the said subsidy bonds, until the said bonds and interest are paid, at least five per centum of the net earnings of the said road to the payment thereof; and likewise to apply to the said debt during and for the whole period during which it shall remain unpaid, one-half of the compensation of all services rendered to the government by the said company.

9. Your petitioners state that if the judgment of forfeiture and

dissolution sought in the cause against the Kansas Pacific Railway is rendered as asked, and if the judgment in the cause against Ames and others shall be rendered as sought, the effect, as your petitioners are advised and fear, may or will be to extinguish the debtor to the United States in respect of the said subsidy bonds and interest, and to disable alike the Kansas Pacific Railway Company and the Union Pacific Railway Company from performing the aforesaid duties enjoined and required by the said acts of Congress toward the government of the United States and the public, and deprive the government of the benefit and advantage thereof, and prevent the application of five per cent. of the net earnings of the road and one-half of the amount received for government service, to the payment thereof.

Your petitioners aver that, by reason of the premises, they are necessary parties to the said proceedings in each of the causes above referred to; and they therefore pray that an order may be made in each of the above causes, making them parties to each of the said actions, and that they be permitted forthwith to file
176 their answer therein for the protection of the interests of the United States in the premises, and to maintain their rights, franchises, and liberties as the government directors of the said Union Pacific Railway Company.

G. G. HAVEN.

STATE OF NEW YORK, *City and county of New York,* } *ss.*

George G. Haven, being duly sworn, says: That he is one of the petitioners in the foregoing petition, and is the chairman of the government directors of the Union Pacific Railway Company. He knows the contents of the petition, and that the facts therein stated are true, as he advisedly and verily believes.

Sworn and subscribed before me, this 27th day of October, 1883.

Witness my hand and seal notarial, the day and year above written.

[SEAL.] WM. J. HARDING,
Notary public, Kings county, New York.

(Certificate filed in New York county.)

[Indorsed:] Nos. 2969—2970. Supreme Court of Kansas. The State of Kansas *ex rel.* W. A. Johnston, as attorney general, *vs.* The Kansas Pacific Railway Company. The same *vs.* F. L. Ames and others. Petition of G. G. Haven and others to intervene.

I, C. J. Brown, clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true and correct copy of the petition of G. G. Haven *et al.*, to intervene, as the same remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Supreme Court, at my office in the city of Topeka, this day of , 1883.

Clerk Supreme Court.

The state of Kansas—In the Supreme Court.

Be it remembered, that on Wednesday, the 7th day of November, 1883, before the Supreme Court, in session at the Supreme Court room in the city of Topeka, the following proceeding, among
177 others, was had, and remains of record at page 191 of Journal "J" of said court:

The State of Kansas ex rel., plaintiff,
vs.
F. L. Ames et al., defendants. } No. 2970.

And now on this 7th day of November, 1883, this cause coming on to be heard on the written application heretofore filed by Geo. G. Haven for himself, Isaac H. Bromley, Colgate Hoyt, A. L. Conger and Watson Parrish, for an order to be made by this court in this cause, making them parties defendant in said cause, and that they be permitted within fifteen days to file their answers therein as government directors, so called, of the Union Pacific Railway Company, J. P. Usher and A. L. Williams appeared for said motion, and W. A. Johnston, Geo. S. Green, A. A. Harris, and W. H. Rossington appeared for the plaintiff. The said motion was argued by counsel, and on consideration it was by the court ordered that the said Geo. G. Haven, Isaac H. Bromley, Colgate Hoyt, A. L. Conger and Watson Parrish be made parties defendant therein, with leave to answer said plaintiff's petition; to which ruling of the court the said plaintiff by its counsel then and there duly excepted.

Witness my hand, and the seal of the supreme court affixed thereto, at my office in Topeka, this day of 188 .

Clerk of the Supreme Court.

178 In the Supreme Court of the state of Kansas.

The State of Kansas ex rel. W. A. Johnston, as Attorney General of the state of Kansas, plaintiff,
vs.
F. L. Ames et al., calling themselves The Board of Directors of the Union Pacific Railway Company, defendants.

Petition of the Government Directors for removal of cause to the Circuit Court of the United States for the district of Kansas.

To the said Supreme Court:

Your petitioners, George G. Haven, Isaac H. Bromley, Colgate

Hoyt, A. L. Conger and Watson Parrish, state that they have filed in this court their petition, stating that they have an interest in and are necessary parties to said cause, to which petition they now refer, and make the same part hereof.

That an order has been asked that your petitioners be made parties to the said action above entitled, and be permitted to answer therein.

That your petitioners are ready to answer therein.

That petitioners show that they are government directors of the Union Pacific Railway Company, duly appointed and commissioned by the President of the United States, and qualified and acting as such.

That your petitioners, the said Haven and Hoyt, are, and were at the commencement of said suit, citizens of the state of New York; that the said Parrish is, and was at the time of the commencement of said suit, a citizen of the state of Nebraska; that said Conger is, and was at the time of the commencement of said suit, a citizen of the state of Ohio; that the said Bromley is, and was at the time of the commencement of said suit, a citizen of the state of Connecticut.

That the matter and amount in dispute in this suit exceeds as to each of your petitioners, exclusive of costs, the sum of value of five hundred dollars. That the defendant F. L. Ames and the
179 other defendants mentioned in the said petition of the said state of Kansas are the directors of the Union Pacific Railway Company elected by the stockholders of the said company, and as such have filed their petition for the removal of the said cause to the Circuit Court of the United States; to which said petition your petitioners now refer, and pray that the same may be taken and considered as part of this their petition.

Your petitioners show that this is a suit arising under the constitution and laws of the United States, to wit, under the act of Congresss of July 1, 1862, referred to in the pleadings herein, and the various acts of Congress amendatory thereof and supplemental thereto. That its decision involves the true and correct construction of the said laws of the United States and the rights, titles, and obligations of your petitioners and the other defendants in the said cause under the said constitution and laws of the United States.

Your petitioners also aver that they, as well as the other defendants, have a good and sufficient defense to this suit arising under the constitution and laws of the United States, and that its decision necessarily involves the true construction and effect of the said act of Congress and the rights and titles of your petitioners thereunder.

That the said Union Pacific Railway Company was, at the commencement of this suit, and still is a corporation other than a banking corporation, organized under the laws of the United States, to wit, under the aforesaid act of Congress of July 1, 1862, and the

various acts of Congress amendatory thereof and supplemental thereto.

That this suit is against the other said directors and against your petitioners as members of such corporation and as directors thereof, and is for an alleged liability of your petitioners as such members and as such directors, and that your petitioners have a defense to this suit and the cause of action of the plaintiff herein as against the said plaintiff arising under the constitution of the United States, and under the laws of the United States hereinbefore referred to. That this suit has not been tried, and is now pending for trial in this honorable court, and that this application is made at or
180 before the term at which it can be first tried, and before the trial thereof.

Your petitioners join with the said Ames and the other directors of the said company in praying for the removal of the cause into the Circuit Court of the Circuit Court.

Your petitioners now, and at the time of filing this their petition in this court, offer good and sufficient security for their entry into the Circuit Court of the United States for the district of Kansas, on the first day of its next session, of copies of all process against them, and all pleadings, depositions, testimony and other proceedings in this cause, and also for their appearing and entering special bail in the said cause, if special bail was originally requisite therein.

And your petitioners make and file herein a bond, giving good and sufficient surety for their entering in the Circuit Court of the United States for the district of Kansas, on the first day of its now next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court, if the said court shall hold that this suit was wrongfully or improperly removed thereto, and for their there appearing and entering special bail in this suit, if special bail was originally and requisite therein.

Wherefore your petitioners pray this honorable court to accept this their petition and their surety and their bond, and proceed no further in the suit.

GEORGE G. HAVEN.
ISAAC H. BROMLEY.
COLGATE HOYT.
A. L. CONGER.
WATSON L. PARRISH.
By WAGER SWAYNE,
Their Attorney.

STATE OF NEW YORK,
County and city of New York, } *ss.*

George G. Haven, being duly sworn, says that he is one of the above-named petitioners; that he has read the foregoing petition, and knows the contents thereof, and that the same is true
181 of his own knowledge, except as to those matters therein

stated to be alleged on information and belief, and as to those matters he believes it to be true.

G. G. HAVEN.

Sworn to before me this 27th day of October, 1883. Witness my hand and seal notarial, hereto set the day and year last above written.

[SEAL.] HERBERT E. DICKSON,
Notary public, city and county of New York.

[Indorsed:] Supreme Court of Kansas. The state of Kansas *ex rel.* W. A. Johnston, as attorney general, *vs.* F. L. Ames and others. Petition for removal. Filed November 7, 1883. C. J. Brown, clerk Supreme Court. No. 2970.

I, C. J. Brown, clerk of the Supreme Court, do hereby certify that the above and foregoing is a full, true and correct copy of the petition for removal, filed in this court, as the same now remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Topeka, this day of 1883.

Clerk Supreme Court.

Know all men by these presents, that we, George G. Haven, Isaac H. Bromley, Watson L. Parrish, Colgate Hoyt, and A. L. Conger, as principals, and ———, as sureties, are hereby bound unto the state of Kansas, or whom it may concern, in the penal sum of five hundred dollars, to the payment of which we jointly and severally bind ourselves hereby. The condition of this obligation is such, that if the above-named principal obligors shall enter and file or cause to be entered and filed in the Circuit Court of the United States for the district of Kansas, on the first day of its next session, copies of all process against it, and of all pleadings, depositions, testimony, and other proceedings in a certain suit
182 or action now pending in the Supreme Court of the state of Kansas, wherein the state of Kansas, on the relation of W. A. Johnston, its attorney general, is plaintiff, and the said F. L. Ames and others, including the obligors in this bond mentioned, are defendants, and shall in said Circuit Court then appear and enter special bail in the said cause or action, if special bail was originally requisite therein, and shall do such other proper acts as by the act or acts of Congress in that behalf are requisite to be done upon the removal of the said cause from the said state court; and upon the further condition, to wit, that if the above-named principal obligors shall enter in the said Circuit Court of the United States, on the first day of its now next session, a copy of the record

in said suit, and shall well and truly pay all the costs that may be awarded by the said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and shall also there and then appear and enter special bail in the said suit if special bail was originally required, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 27th day of October, 1888.

Sealed and delivered in the presence of Wm. J. Harding, as to G. G. Haven and C. Hoyt.

G. G. HAVEN. [SEAL.]
ISAAC H. BROMLEY,
By WAGER SWAYNE,
His attorney in fact. [L. S.]

W. L. PARRISH,
By WAGER SWAYNE,
His attorney in fact. [L. S.]

COLGATE HOYT. [SEAL.]
A. L. CONGER,
By WAGER SWAYNE,
His attorney in fact. [L. S.]

JOHN R. MULVANE. [L. S.]
JOAB MULVANE. [L. S.]

[Indorsed:] 2970. Supreme Court of Kansas. The state of Kansas *ex rel.* W. A. Johnston, as attorney general, *vs.* F. L. Ames *et al.* Bond for removal. Filed Nov. 7, 1883. C. J. Brown, clerk Supreme Court.

183 I, J. C. Brown, clerk of the Supreme Court of Kansas, do hereby certify that the above and foregoing is a full, true and complete copy of the bond for removal in the above-entitled cause, as the same remains on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Topeka, this day of , A. D. 1883.

Clerk Supreme Court.

184 And afterwards, on the 7th day of November, A. D. 1883, the same being one of the regular judicial days of the July term A. D. 1883, of the Supreme Court of the state of Kansas, before the said court in session at the Supreme Court room in the city of Topeka — present: Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine and Hon. David J. Brewer, asssociate justices, and C. J. Brown, clerk of said court—the following proceedings, among others, was had and entered of record, as follows, to wit:

The State of Kansas ex rel., plaintiff,
vs.
Kansas Pacific Railway Co., defendant. } No. 2969.

And now, on this 7th day of November, 1883, this cause came on to be heard, on the written application heretofore filed by Geo. G. Haven, for himself, Issac H. Bromley, Colgate Hoyt, A. L. Conger and Watson Parrish, for an order to be made by this court in this cause making them parties defendant in said cause, and that they be permitted forthwith to file their anwer therein as government directors, so-called, of the Union Pacific Railway Company. J. P. Upsher and A. L. Williams appeared for said motion, and W. A. Johnston, Geo. S. Green, A. A. Harris and W. H. Rossington appeared for the plaintiff. The said motion was argued by counsel, and, on consideration, it was by the court overruled; to which ruling of the court the petitioners except.

185 And afterwards, on the 7th day of November, A. D. 1883, the same being one of the regular judicial days of the July term A. D. 1883, of the Supreme Court of the state of Kansas, before the said court in session at the Supreme Court room in the city of Topeka—Present: Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine and Hon. David J. Brewer, associate justices, and C. J. Brown, clerk of said court—the following proceedings among others, was had and entered of record, as follows, to wit:

The State of Kansas ex rel., plaintiff,
vs.
Kansas Pacific Railway Co., defendant. } No. 2969.

And now, to wit, on this 7th day of November, 1883, the petition of the respondent to remove this cause to the United States Circuit Court for the district of Kansas, came to be heard. The plaintiff appeared by W. A. Johnston, attorney general, and W. H. Rossington, A. A. Harris and Geo. S. Green, its attorneys. The respondent appeared by J. P. Usher and A. L. Williams, its attorneys, which said application was argued by counsel and considered by the court; and the court finds that the sureties upon the bond for removal filed in this cause are sufficient.

Thereupon the application of the plaintiff to plead to the answer of the respondent filed in this case, within thirty days from the date hereof, came on to be heard, and the same was by the court granted, and the cause is continued until the January, A. D. 1884, session of this court.

186 THE STATE OF KANSAS, } *ss:*
Supreme Court,

I, C. J. Brown, clerk of the Supreme Court of the state of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings and of the record of proceedings had in the above-entitled cause, and the same remain of record and on file in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the Supreme Court of the state of Kansas, at my office in Topeka, this 24th day of November, A. D., 1883.

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

[Indorsed:] Term No. 312; No. 4440. The state of Kansas ex. rel. W. A. Johnston, as attorney general, plaintiff, *vs.* The Kansas Pacific Railway Company. Petition Filed Nov. 24, 1883; A. S. Thomas, clerk, by Frank J. Thomas, deputy.

187 United States Circuit Court, district of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney-general, plaintiff,
against
F. L. Ames and others, defendants.

Answer of Government Directors.

And now comes George G. Haven, Isaac H. Bromley, Watson Parrish, Arthur L. Conger and Colgate Hoyt, by Wager Swayne, their attorney, and having first by leave of the court been made parties defendant to the petition herein filed, for answer say:

FIRST. They deny, upon information and belief, that Frederick L. Ames and others named in said petition as defendants call themselves the board of directors of the Union Pacific Railway Company, save as hereinafter set forth.

And these defendants, further answering, say that the Union Pacific Railway Company is a corporation created by an act of the Congress of the United States, approved July 1st, 1862, and other acts amendatory and supplemental thereto, and particularly
188 an act approved July 2d, 1864. In and by said act of July 1st, 1863, it is provided:

"That at the time of the first and each triennial election of the directors by the stockholders, two additional directors shall be appointed by the President of the United States, who shall act with the body of the directors and be denominated directors on the part of the government, and that any vacancy happening in the government directors at any time may be filled by the President of the United States."

And in and by said act of July 2d, 1864, it is further provided:

"That at and after the next election of directors the number of the directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of the government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed."

And these defendants, further answering, say that each of them is at this time one of the five directors contemplated by the aforesaid provision of the said act of July second, 1864, appointed by the President of the United States, and duly commissioned and qualified.

And these defendants, further answering, say that the provisions of said act are of valid and binding force upon the Union Pacific Railway Company, and that the individual defendants named in said petition are not and do not call themselves the board of directors of the Union Pacific Railway Company, save only when acting in conjunction with these defendants as required and provided by taid act.

And these defendants, further answering, admit that calling themselves, together with the said Frederick L. Ames and others named as individual defendants in the petition herein filed, the
189 board of directors of the Union Pacific R. Co., they and their predecessors have, ever since Jan. 24, 1880, used and still do use the liberties, privileges, and franchises of being a railroad company, and of using, operating, enjoying, and receiving the tolls, issues, profits, and benefits derived from the operation and use of the railroad of the Kansas Pacific Railway Company, which said line and lines of railroad, with all properties, equipments, easements, subserviences, privileges, rights, liberties, and franchises were, prior to the said 24th day of January, 1880, used, occupied, controlled, and enjoyed by the Kansas Pacific Railway Company, but these defendants deny that they have at any time or still do use the same without any warrant, charter, or grant, as in said petition alleged; and further deny that the said line or lines of railroad so operated and used by these defendants are correctly described in said petition, and aver that the said line of railroad extends from the Missouri river at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, and from such point of connection in the state of Missouri, by way of Lawrence and Topeka, in the state of Kansas, or the bank of the Kansas river opposite said towns, to a connection at the city of Denver, Colorado, with the railroad formerly of the Denver Pacific Railway and Telegraph Company, a corporation of the territory of Colorado, and thence by means of the railroad formerly of said Denver Pacific Railway and Telegraph Company to a point of connection with the main line of the Union Pacific Railway Company at Cheyenne, in said territory of Colorado, the said railroad of the Kansas Pacific Railway Company, including also a branch of said railroad from the city of Leavenworth, Kansas, to and uniting with the main stem at or near the city of Lawrence, Kansas.

190 And these defendants, further answering, deny that the said Kansas Pacific Railway Company derived its right to use, enjoy, employ, and exercise the said line and lines of railroad, with their properties, equipments, easements, subserviences, privi-

leges, rights, liberties, and franchises, from or under an act passed in the year 1855, at a session of the legislature of the territory of Kansas, which act was entitled "An act to incorporate the Leavenworth, Pawnee and Western Railroad Company," or from or under the further act passed by the legislature of the territory of Kansas in the year 1857, at a session of said legislature, supplemental to said act of 1855, entitled "An act supplemental to an act entitled 'An act to incorporate the Leavenworth, Pawnee and Western Railroad Company,'" as in said petition alleged.

And these defendants, further answering, say that on and before the 4th day of March, A. D. 1862, it was well known to the people of the state of Kansas, and to their state officers and legislature, that it was in contemplation by the people of the United States, through their senators and representatives in Congress assembled, to provide for the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government of the United States the use of the same for postal, military, and other purposes, and to that end to provide by an act of the Congress of the United States that certain persons in said act to be named should be and become a body politic and corporate of the United States, and should have full power and authority as such to construct and operate the said railroad and telegraph, and use, enjoy, and operate the same, subject only to the control and paramount authority of the United States forever; and for that purpose to have the rights, powers, and privileges of a railway company.

On the said 4th day of March, 1862, the state of Kansas, by an act of its legislature of that date, which is hereby referred to and made a part hereof, petitioned the Congress of the United
191 States that its forthcoming act to provide for the construction of the said railroad and telegraph, should be so framed as to require that the route of the said railroad and telegraph from the Missouri river to the Pacific ocean should be by way of Fort Riley, in said state; and should further provide that any railroad company then or thereafter incorporated, might unite in the construction of said railroad upon filing their assent to said act; and should further provide that all of the railroads named therein and assenting thereto, upon the application of any two of them, might form themselves into one consolidated company, upon such terms as might be just and equitable between them, and as provided in said act.

In and by said act of the legislature of Kansas of March 4th, 1862, it was further provided that the senators and representatives in Congress of said state should forthwith lay the same before the Congress of the United States, which was accordingly done.

Afterwards, to wit, on the first day of January, 1862, the Congress of the United States, by an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use

of the same for postal, military, and other purposes," and as requested by the state of Kansas as aforesaid, did authorize the Leavenworth, Pawnee and Western Railroad Company, being a railroad company originally incorporated by the legislature of the territory of Kansas, to unite in the construction of said railroad and telegraph line. The said act of July 1st, 1862, however, did not permit said company to construct the same in the exercise of the charter powers conferred by an act of the legislature of the territory of Kansas, entitled, "An act to incorporate the Leavenworth, Pawnee and Western Railroad Company," above referred to, or conferred by a further act of said legislature, entitled, "An act supplemental to the act last above mentioned,"

192 as hereinbefore referred to, which powers were to construct a railroad from the west bank of the Missouri river, in the town of Leavenworth, thence west to the town of Pawnee, or to some point feasible, and near to the government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the territory. Also, from some favorable point on the Leavenworth, Pawnee and Western Railroad, and following the most practical route southwardly to a termination on the southern boundary of the territory of Kansas, at some point where an easy connection might be had with a line of railroad extending through the Indian territory and state of Texas to the gulf of Mexico; but the said act of Congress required said company to unite in the construction of said railroad and telegraph from the Missouri river to the Pacific ocean only upon the terms and conditions in said act provided, and in the exercise of the powers conferred thereby, and to construct the same from a connection with the Pacific Railroad of Missouri at or near the mouth of the Kansas river, as aforesaid, to a point on the one hundredth meridian in the territory of Nebraska, to be further defined as provided in said act; and thereafter to hold, use, and enjoy the same upon the same terms and conditions as the body politic and corporate created by said act, and under the authority and subject to the paramount control of the United States.

And in and by said act of Congress of July 1st, 1862, it was further provided, as requested by the state of Kansas as aforesaid, that all of the railroad companies named therein and assenting thereto, or any two or more of them, were authorized to form themselves into one consolidated company, and should thereafter proceed to construct said railroad and branches and telegraph lines upon the terms and conditions provided in said act.

And it was further provided, in and by said act, that the Leavenworth, Pawnee and Western Railroad Company, upon

193 filing its assent thereto, might have, hold, and enjoy the privileges and benefits provided by said act, but that the Congress of the United States might at any time, having due regard for the rights of the companies named therein, add to, alter, amend, or repeal said act.

And these defendants further say that thereafter said Leavenworth, Pawnee & Western Railroad Company did file its acceptance of the provisions of said act of Congress of July 1st, 1862, and did proceed with the knowledge and approval of the United States, and of the state of Kansas, and of the proper authorities thereof, in the construction of said railroad as provided by said act and under the authority conferred thereby.

And these defendants, further answering, say that, relying, as these defendants are informed and believe, on the power and authority of the said Leavenworth, Pawnee & Western Railroad Company under the authority conferred on it by the said act of July 1st, 1862, and the assent and acquiescence of the state of Kansas to the provisions of said act, as declared by said state and conveyed to the Congress of the United States by the act of the legislature of said state, passed March 4th, 1862, as hereinbefore set forth; and also relying upon the paramount authority and control over said company in the exercise of its right to construct, use and operate said railroad, which had been secured to the United States by the provisions of said act of Congress of July 1st, 1862, and by the consent to and acquiescence in such paramount authority and control, given by the state of Kansas through its legislature, as aforesaid, and further relying upon the right and power of the United States to secure and enforce by means of such authority and control the operation and use of said railroad by the people and government of the United States, and as one connected and continuous line, as provided in said act, the United States thereupon made to the Union Pacific Railroad Company, eastern division, large and valuable grants of land, and further issued to said company the bonds of the United States for a great sum of money loaned to said company in aid of the construction of its railroad, as aforesaid, which sums of money are still largely owing and unpaid.

194 And these defendants, further answering, say that not only was it among the provisions of said act of Congress of July 1st, 1862, that all of the companies which should unite in the construction of such railroad and telegraph might consolidate themselves into one company, as therein provided, but it was further expressly required by said act that the whole line of said railroad and branches and telegraph should be operated and used for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one connected, continuous line. And in the legislation of Congress amendatory of and supplemental to said act of July 1st, 1862, it is made the duty of all the companies uniting in the construction of any part of said railroad and telegraph to operate and use the whole of said railroad, branches and telegraph for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one connected, continuous line; and these defendants aver that all of the provisions in said act by means of which the same might be more fully accomplished or secured, including the

power of consolidation, as before set forth, were conditions and stipulations which to that end were imposed by the United States, and to which the state of Kansas had consented in advance by an act of its legislature as aforesaid.

And these defendants, further answering, say that the name of the Leavenworth, Pawnee and Western Railroad Company was afterward changed to the Union Pacific Railway Company, eastern division. At what time or by what authority this change was made these defendants are not advised; they aver, however, that
195 such change and authority therefor was fully known and recognized, both by the state of Kansas and by the United States.

And these defendants, further answering, say that on the first day of March, 1864, the state of Kansas, fully recognizing that by virtue of the several acts of legislation hereinbefore set forth, the said Union Pacific Railway Company, eastern division, had united in the construction of the railroad and telegraph from the Missouri river to the Pacific ocean, which said railroad and telegraph were being constructed under the authority of and were under the paramount control of the United States, did, by an act of its legislature, taking effect on the said first day of March, 1864, petition and request the Congress of the United States that, in the exercise of its right aforesaid to add to, alter, amend, or repeal the said act of July 1st, 1862, require said Union Pacific Railway Company, eastern division, to construct its railroad through Kansas by way of certain designated places in said state. The said act of the legislature of Kansas of March 1st, 1864, is hereby referred to and made part hereof.

And on the second day of July, 1864, by an act which on that day was approved, the Congress of the United States, in the exercise of its right as aforesaid and as requested by said state of Kansas, did require the said Union Pacific Railway Company, eastern division, to build its said railroad through Kansas by way of certain of the places designated by said state as aforesaid. And to enable said railroad company to more speedily construct its railroad and more fully perform its other obligations in respect thereto, conferred upon said company additional grants and further benefits, as provided by said act.

All of which these defendants are informed and believe were done by the United States in reliance upon its paramount authority and control secured to it by the provisions of the aforesaid acts of Congress, and the consent and acquiescence of the state of Kansas, as hereinbefore set forth.

196 And these defendants, further answering, say that afterwards, to wit, on the 9th day of February, 1867, the railroad of said Union Pacific Railway Company, eastern division, being yet incomplete, the state of Kansas, by a legislative act which on that day took effect, represented to the Congress of the United States that the aid theretofore granted to said company was insuffi-

cient to enable said company to construct its railroad to a junction with the main line of said Union Pacific Railroad as rapidly as the interests of said state and of the United States required; and thereupon urgently requested the Congress of the United States to grant further aid to said company upon such terms and conditions as would secure the government against loss, and would assure the speedy completion of said railway to a junction with the main line, as aforesaid.

And afterwards, to wit, on the 7th day of February, 1868, the state of Kansas, by a legislative act which took effect on that day, further presented to the Congress of the United States that an extension of the Union Pacific Railway, eastern division, to a connection by way of Denver city with the main line of said Union Pacific Railway Company was demanded by considerations of great consequence to the people of said state and of the United States, and renewed its request that such legislation by way of further grants and otherwise as would assure the speedy completion of said railway to a junction with the main line of the Union Pacific Railroad, as aforesaid.

Said two last-mentioned acts of the legislature of Kansas are hereby referred to and made part hereof.

And afterwards, to wit, on the third day of March, 1869, the Congress of the United States, by an act which on that day was approved, as these defendants aver on information and belief, still relying on the right and control secured to the United States
197 by the acts of Congress and of the legislature of Kansas hereinbefore set forth, and relying also upon the acquiescence of said state in the construction of said railroad by said Union Pacific Railway Company, eastern division, upon the route designated by said act and under the terms and provisions thereof, and the ability of said company by means of the privilege and powers by said act conferred, including the power of consolidation hereinafter referred to to perform all the requirements of said act, and upon the power of the United States to secure as aforesaid the use and operation of the whole of said railroad and branches as one connected, continuous line, did extend or confirm to said company large additional grants of land in aid of the completion of said railroad, and to the same end did confer upon said company further benefits as in said act are more fully set forth, and further authorized the construction of the railroad of said company to a connection with the railroads of the Union Pacific system at the city of Denver, in the territory of Colorado, as requested by said state. And these defendants, further answering, say that the said Kansas Pacific Railroad Company thereupon completed its said railway to a connection with the railroad of the Union Pacific Railway Company at Denver, Colorado, as required by said act, and said railroad was accepted by the United States as having been built and completed in all respects under and as required by the acts of Congress hereinbefore set forth.

And on the same day, to wit, on the third day of March, 1869, the Congress of the United States, in the further exercise of its paramount control over said Union Pacific Railway Company, eastern division, did change the name of said company to the Kansas Pacific Railway Company.

And these defendants, further answering, say that afterwards, to wit, on the 7th day of February, 1874, the state of Kansas, by an act of the legislature which took effect on that day, did further represent to the Congress of the United States that for want of equal advantages and facilities, such as would result from the operation and use of said Union Pacific Railroad and branches as one connected and continuous line, the said Kansas Pacific Railway Company was compelled to discriminate against the citizens of the state of Kansas, and was compelled to support a continuous line of seven hundred and forty-five (745) miles of completed railway from the rates and earnings of about three hundred miles of paying road; and said railroad company was thereby compelled to advance their rate of transportation for freight and passengers within the state, and that the commercial and agricultural interests of the state of Kansas were seriously retarded and injured thereby.

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And thereupon the Congress of the United States was by said state of Kansas requested to take such measures as would at an early day compel the Union Pacific Railway Company to afford facilities for the transportation of freight and passengers, both in regard to rate, time, and transportation, without discrimination or injury to said Kansas Pacific, formerly Union Pacific Railway, eastern division.

And thereafter, to wit, on the 20th day of June, 1874, the Congress of the United States did, by an act which on that day was approved, require the several companies which by the aforesaid act of July 1st, 1862, were authorized to unite in the construction of the said railroad and telegraph from the Missouri river to the Pacific ocean, and each and every of the officers and agents of said company, on pain of fine and imprisonment, to permit the said railroad and telegraph and branches to be operated and used as one continuous line, and to have and enjoy equal advantages and facilities as to rate, time, and transportation, without any discrimination of any kind in favor of or adverse to the route and business of any or either of said companies.

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And it further provided that for all the purposes of the act of July 1st, 1862, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company should be deemed and taken to be a part of the extension of the railroad of said Kansas Pacific Railway Company to the point or junction thereof with the road of the Union Pacific Railway Company at Cheyenne, as provided in the act of March 3d, 1869.

And these defendants, further answering, say on information and belief, that notwithstanding the provisions of said last-mentioned

act of Congress, the said Kansas Pacific Railway, the disabilities and injuries to the Kansas Pacific Railway Company, and to the people of Kansas and of the United States, continued and increased, and the said Kansas Pacific Railway was not and could not be operated as one connected and continuous line with the Union Pacific Railroad as required by law.

And these defendants, further answering, say that afterwards, to wit, on the said 24th day of January, 1880, the said Kansas Pacific Railway Company, the Denver Pacific Railway & Telegraph Company, and the Union Pacific Railroad Company, formed themselves into one consolidated company, to wit, the Union Pacific Railway Company.

And these defendants, further answering, say, upon information and belief, that said companies did so unite and consolidate their organizations in a manner which was not incompatible with the aforesaid acts of Congress, or with the laws of Kansas or of Colorado, and did adopt such corporate name and style as they agreed on, with a capital stock not exceeding the actual cost of the roads so consolidated, and did file a copy of such consolidation in the department of the interior, and thereupon such consolidation was consented to and was fully adopted and ratified by the United States.

"And thereupon such organization, so formed and consolidated, did succeed to, possess, and become entitled to receive from the Government of the United States, all and singular the grants,
200 benefits, immunities, guarantees, acts and things to be done and performed, and became and was subject to the same terms, conditions, restrictions and requirements which said companies, at the time of such consolidation, were or might be entitled or subject to under said acts of Congress, in place and substitution of said companies, so consolidated respectively. And all other provisions of said act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, did apply and become of force as to such consolidated organization."

And these defendants, further answering, say, that the matter in dispute herein between is, as between each of these defendants and the state of Kansas, of more than the sum or value of five hundred dollars; and that that there is also, as matter in dispute herein between these defendants, as directors of the Union Pacific Railway Company, and the state of Kansas, which exceeds the sum or value of five hundred dollars; and that there is also a matter in dispute herein between these defendants as directors in said company on the part of the United States, and the state of Kansas, which exceeds the sum or value of five hundred dollars; and furthermore, that each of these defendants and of the remaining directors of said Union Pacific Railway Company is a citizen of the United States other than the state of Kansas.

For further answer these defendants say that all allegations in

said petition, not herein expressly admitted, are denied, and they ask that the plaintiff be required to make strict proof of the same.

These defendants, though protesting and insisting that the said petition is insufficient, have nevertheless fully answered the same, and pray that said petition may be dismissed, and that they may recover their costs in this behalf incurred, and may have all proper relief.

By WAGER SWAYNE,
Their Attorney.

201 THE STATE OF NEW YORK, }
City and county of New York, } *ss.*

George G. Haven, being sworn, says that he is one of the defendants, and is chairman of the government directors of the Union Pacific Railway Company; that he knows the contents of the foregoing answer, and the same are true as he verily believes.

GEORGE G. HAVEN.

THE STATE OF NEW YORK, }
City and county of New York, } *ss.*

I, William J. Harding, notary public in and for said city, county and state, do herby certify that the above and foregoing answer and verification was signed by the said George G. Haven in my presence, and sworn to by him before me, this sixteenth day of November, 1883.

Witness my hand and official seal hereto set the date last above written.

WM. J. HARDING,
Notary Public, Kings county, New York.

Certificate filed in New York county.

THE STATE OF NEW YORK, }
City and county of New York, } *ss.*

Patrick Keenan, clerk of the city and county of New York, and also clerk of supreme court for the said city and co. being a court of record, do hereby certify that William J. Harding has filed in the clerk's office of the county of New York, a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county this 17th day of Nov., 1883.

[SEAL.] PATRICK KEENAN, *Clerk.*

202 (Endorsed:) Filed Nov. 21st, 1883; A. S. Thomas, clerk, by Frank J. Thomas, deputy; refiled Nov. 24th, 1883; A. Thomas, clerk, by Frank J. Thomas, deputy.

203 In the Circuit Court of the United States, district of Kansas.

The State of Kansas ex rel. W. A. Johnston, attorney general, plaintiff,
vs.
Frederick L. Ames et al., defendants.

The State of Kansas ex rel. W. A. Johnston, attorney general, plaintiff,
vs.
The Kansas Pacific Railway Company, defendant.

It hereby stipulated and agreed by and between the above parties by their counsel, that the said plaintiff may plead to the jurisdiction of the above-entitled court in said causes by filing motions to remand; but such motions shall be filed within three days from the date hereof.

It is further agreed that said motions to remand shall be heard at a time and place to be agreed upon that shall be convenient to the judges of said court and counsel; said time to be not earlier than Dec. 11, 1883, and not later, unless otherwise ordered by the judges, than the middle of the month of January, 1884; the judges to fix the time and place of hearing if counsel cannot agree upon such time and place.

It is further stipulated and agreed that until said motions to remand are heard and determined by said Circuit Court that no proceedings of any kind shall be had or taken by said plaintiff, by himself or counsel, in the Supreme Court of the state of Kansas, in either of said above-entitled causes, and it is agreed by said defendants that no default of the plaintiff in pleading or otherwise in said Supreme Court shall be taken advantage of by said defendants; and it is further agreed that failure to plead or appear by either party in said Supreme Court shall not operate as or be held a default, but that said cases may be continued in such Supreme Court until said motions to remind are heard and determined. It is the intention
204 and agreement of the said parties that the *status quo* in both the above-entitled causes, both in the state and circuit court shall be held to be preserved until said motions to remand are heard and determined as aforesaid by the Circuit Court.

At the time of the hearing of the motions to remand, the parties reserve the right to make any motions if the judges will hear the same necessary to preserve the cases for final hearing or trial.

This stipulation shall not be construed as an admission by the de-

fendants in either of said suits of the jurisdiction of the state court, or as admission by the plaintiff in either of said suits of the jurisdiction of the said Circuit Court of the United States. Any orders or judgments of the court or judges may be entered *nunc pro tunc* as of this term. This stipulation to be entered of record, both in the State and the Circuit Court.

Dated at Topeka, Kansas, this 27th day of November, 1883.

W. A. JOHNSTON,
Attorney-General.

JOHN F. DILLON,
J. P. USHER,
A. L. WILLIAMS,
For all of the Defendants except the Government Directors.

WAGER SWAYNE,
For Government Directors.

(Endorsed:) No. 4440–4441, State of Kansas ex rel. W. A. Johnston, att'y gen'l, *vs.* F. L. Ames et al.; same *vs.* Kan. Pac. R.W. Co.; stip. as to hearing; filed Nov. 27, 1883; A. S. Thomas, clerk.

205 In the Circuit Court of the United States for the district of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff
vs.
The Kansas Pacific Railway Company, defendant.
} Motion to remand.

Now comes the plaintiff herein and moves the court to remand this cause to the Supreme Court of the state of Kansas, for the reason that it appears from the record thereof that said cause is not removable, and that this court is without jurisdiction to try and determine the same.

W. A. JOHNSTON,
Attorney-General.

C. A. SEWARD,
W. H. ROSSINGTON,
GEO. S. GREEN,
A. A. HARRIS,
Of Counsel.

(Endorsed:) No. 4440; The state of Kansas ex rel. W. A. Johnston, as att'y general, *vs.* The Kansas Pacific Railway Company; motion to remand; filed Nov. 30, 1883; A. S. Thomas, clerk.

206 In the Circuit Court of the United States for the district of Kansas.

The State of Kansas ex rel. W. A. Johnston, as attorney general,
vs.
The Kansas Pacific Railway Company.

This cause came on to be heard upon the motion of the plaintiff to remand the cause to the Supreme Court of the state from whence it was removed; and being argued by counsel, and the court being fully advised in the premises, doth now order and adjudge that the said motion be, and the same is hereby, sustained, and said cause remanded to the Supreme Court of the state of Kansas. The said defendants then and there duly excepted to the said order and judgment.

GEO. W. McCRARY,
Circuit Judge.

(Endorsed:) No. 4440; order remanding to the Supreme Court of the state of Kansas; filed January 7, 1884; A. S. Thomas, clerk.

207 UNITED STATES OF AMERICA, *District of Kansas*, } *ss*:

To the honorable justices of the Supreme Court of the United States:

And now comes the Kansas Pacific Railway Company, by John F. Dillon, J. P. Usher, and A. L. Williams, its attorneys, and complains that in the record and proceedings, and also in the rendition of judgment in a suit between the state of Kansas ex rel. W. A. Johnston, as attorney general, plaintiff, and said the Kansas Pacific Railway Company, defendant, tried in the Circuit Court of the United States for the district of Kansas, at the June term thereof, A. D. eighteen hundred and eighty-three, and in which judgment was rendered against the Kansas Pacific Railway Company on the 7th day of January, 1864, by which judgment said cause was remanded from said Circuit Court to the Supreme Court of the state of Kansas, in which it was originally begun, manifest error hath intervened to the great damage of said the Kansas Pacific Railway Company.

Wherefore it prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

Allowed.

GEO. W. McCRARY,
Circuit Judge.

(Endorsed:) No. 4440; order allowing writ of error; filed January 7, 1884; A. S. Thomas, clerk.

208 In the Supreme Court of the United States.

Know all men by these presents, that we, the Kansas Pacific Railway, principal, and A. L. Williams and H. P. Dillon, sureties, are held and firmly bound unto the state of Kansas in the sum of five hundred dollars, to be paid to said state of Kansas, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals, and dated this seventh day of January, 1884.

Whereas, the above-named Kansas Pacific Railway Company have prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment rendered in the above entitled action by the Circuit Court of the United States for the district of Kansas, remanding said cause to the Supreme Court of the state of Kansas, from whence it had been taken—

Now, therefore, the condition of this obligation is such, that if the above-named Kansas Pacific Railway Company shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void, otherwise in full force and virtue.

THE KANSAS PACIFIC RAILWAY,
By A. L. WILLIAMS, *its Attorney.*
A. L. WILLIAMS,
H. P. DILLON.

Signed, sealed, and delivered in presence of—
L. S. WILSON.

This bond approved Jan. 7, 1884.

C. G. FOSTER, *Judge.*

(Endorsed:) No. 4440; filed January 7, 1884; A. S. Thomas, clerk.

209 UNITED STATES OF AMERICA, *ss.*

To the state of Kansas and W. A. Johnston, attorney general of said state of Kansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 14th day of January next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the district of Kansas, wherein the Kansas Pacific Railway Company is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. McCrary, judge of the Circuit Court of the United States for the district of Kansas, this 7th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

GEO. W. McCRARY,
Circuit Judge.

210 (Endorsed:) No. 4,440; The state of Kansas ex rel. W. A. Johnston, as attorney general, *vs.* The Kansas Pacific Railway Company; citation; filed Jan. 7, 1884; A. S. Thomas, clerk.

211 *Stipulation.*

In the Circuit Court of the United States, district of Kansas.

State of Kansas ex rel. W. A. Johnson, as attorney general,
vs.
The Kansas Pacific Railway Company.

It is stipulated by and between the parties to this cause that the state shall take no proceedings or steps in the Supreme Court of the state until after the decision or judgment of the Supreme Court of the United States on the writ of error to be taken by the defendant to the said order of judgment remanding the said cause, or in conflict therewith, it being understood and agreed that a writ of error shall be taken by the defendant to the order or judgment remanding the cause, returnable at the present term of the Supreme Court of the United States, the state hereby consenting and requesting that the record may be immediately printed without further notice, and the cause advanced by the Supreme Court of the United States, without further notice, to such early day as may suit its convenience, both parties earnestly requesting to be heard at bar.

It is further stipulated by and between the parties that the state may, with the consent of the Supreme Court, read in argument all the records in relation to the Leavenworth, Pawnee and Western Railway Company, filed in the offices of the secretary of state of the state of Kansas, the secretary of the interior, and in the central land office connected therewith; also, the mortgages of the Kansas Pacific Railway Company filed and recorded in the state of Kansas; also, the minutes of the board of directors of the Kansas Pacific Railroad Company accepting certain provisions of the general corporation laws of the state of Kansas; also, the minutes of the said board in increasing the capital stock of the said company, and changing the name of said company; also, all reports of the same company to its stockholders; also, the pleadings, briefs and arguments of counsel presented and filed by said company in the legisla-
212 ture and courts of the state of Kansas, as well as in the Circuit Court for the district of Kansas and the Supreme Court of the United States.

And it is further stipulated that the defendant company may, with the consent of the Supreme Court, read in argument therein any and all laws or resolutions passed by the legislature of the state of Kansas, whether general or special, concerning or in any way relating to the defendant company or the matter in controversy, including those referred to in the exhibit to the answer filed in the cause; and also all documents and records referred to or set forth in the said answer; also, any or all the official documents in the department of the interior and in the department of the treasury in reference to the defendant company, including the articles of consolidation, and the corporate vote and action adopting the same; also, the maps of the route of the said railway company and the official correspondence in reference thereto; the appointment by the President of the United States of commissioners to examine said road, their reports to the President, and acceptance of the same by the President; also, the certificate of said commissioners of the completion and equipment of the said road; also, the record evidence of the issue of subsidy bonds and patents for lands to the defendant company under the acts of Congress; also, the report of the government directors, and auditor and commissioner of railroads; also, the bills, journals and debates in Congress and acts of Congress in relation thereto.

W. A. JOHNSTON,
Attorney General State of Kansas.

(Endorsed:) No. 4440; filed January 7, 1884; A. S. Thomas, clerk.

213 In the Supreme Court of the United States.

The State of Kansas ex rel. W. A. Johnston, as attorney general,
vs.
The Kansas Pacific Railway Company.

We hereby acknowledge service of citation in the abvove entitled case and agree that the same may be returnable on the 14th day of January, 1884.

We further stipulate and agree that a motion to advance said cause for hearing may be made before the Supreme Court of the United States on Monday, the fourteenth day of January, 1884, or at any day subsequent thereto convenient to the court, and we waive any notice of such motion, it being understood by the parties to this suit that said motion is to be called up at that time if it can be heard. We further stipulate and agree that the record shall be printed immediately, and that the motion to advance said cause shall be heard whether said record has then been printed or not.

We further stipulate and agree that if said cause is advanced it

may be heard at any time which suits the convenience of the court after the 28th day of January, 1884.

W. A. JOHNSTON,
Attorney General state of Kansas.

(Endorsement:) No. 4440; stipulation; filed January 7, 1884; A. S. Thomas, clerk.

214 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judge of the Circuit Court of the United States for the district of Kansas, greeting:

Because in the records and process, and also in the rendering of judgment, and an order remanding a cause in a suit before you, or some of you, between the Kansas Pacific Railway Company, plaintiff in error, and the state of Kansas, on the relation of its attorney general, W. A. Johnston, defendant in error, a manifest error has intervened, to the great damage of the said plaintiff in error, as in its petition for writ of error has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States on the 14th day of Jan., 1884, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, chief justice of the said Supreme Court, at Washington aforesaid, this 7th day of Jan., in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) No. 4440; The State of Kansas ex rel. W. A. Johnston, as attorney general, *vs.* The Kansas Pacific Railway Company; writ of error; filed Jan. 7, 1834; A. S. Thomas, clerk.

215 United States of America, } *ss.*
District of Kansas. }

I, A. S. Thomas, clerk of the Circuit Court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record of all the proceedings in said court in the action of The State of Kansas ex. rel. W. A. Johnston, as attorney general, *vs.* The Kansas Pacific Railway Company, No. 4440 in said court.

In testimony whereof I have hereunto set my hand and affixed

the seal of said court, at my office, in Topeka, in said district of Kansas, this 7th day of January A. D. 1884.

A. S. THOMAS, *Clerk.*

(Endorsement on cover:) Kansas, C. C. U. S.; No. 1241; The Kansas Pacific Railway Company, plaintiff in error, *vs.* The State of Kansas ex rel. W. A. Johnston, attorney general; filed 14th January, 1884; 214 pages.

III-449

In the Supreme Court of the United States.

THE KANSAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, ex. rel. W. A. JOHNSTON, as Attorney-General,
Defendant in Error.

F. L. AMES et al., calling themselves the Board of Directors of the Union Pacific Railway Company,
Plaintiffs in Error,

vs.

THE STATE OF KANSAS, ex rel. ATTORNEY-GENERAL,
Defendant in Error.

October Term, 1883

Brief for the Plaintiffs in Error on the Right to Remove the Cases into the Federal Court.

JOHN F. DILLON,
For the Plaintiffs in Error other than the Government Directors.

J. R. HALLOWELL,
District Attorney, AND

WAGER SWAYNE,
For the Government Directors.

SIDNEY BARTLETT,
J. P. USHER,
A. L. WILLIAMS,
Of Counsel.

C. G. BURGOYNE, PRINTER, 57, 59 & 61 PARK STREET.

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In the Supreme Court of the United States.

THE KANSAS PACIFIC RAILWAY CO.,
Plaintiff in Error,

AGAINST

THE STATE OF KANSAS, EX REL. W. A. JOHNSTON, as Attorney-General,
Defendant in Error.

F. L. AMES ET AL., calling themselves the Board of Directors of the UNION PACIFIC RAILWAY COMPANY,
Plaintiffs in Error,

AGAINST

THE STATE OF KANSAS, EX REL. ATTORNEY-GENERAL.

October Term, 1883.

Brief for Plaintiffs in Error on the Right to Remove the Cases into the Federal Court.

JOHN F. DILLON, for Plaintiffs in Error.

STATEMENT OF CASE.

These are two separate *quo warranto* actions, originally brought in 1883 by the State of Kansas in

the Supreme Court of the State; one against the Kansas Pacific Railway Company, the other against fifteen directors of the Union Pacific Rail*way* Company, into which the Kansas Pacific Company was consolidated, January 24, 1880.

In both suits the five Government directors of the Union Pacific Railway Company applied to the Supreme Court of Kansas to be made parties defendant. The application was denied by that Court in the case against the Kansas Pacific, and granted in the case against the directors.

The Kansas Pacific Company filed its answer in the case against it. In the other case, the Directors of the Consolidated Company and the Government Directors answered severally.

Thereupon, the defendants in each case filed, in due time and form, petitions and bonds for the removal of the causes to the Circuit Court of the United States.

The petitions for the removal were based upon two grounds.

1st. That each of the cases was one arising under the Constitution and Laws of the United States.

2d. That each of the cases was removable under section 640 of the Revised Statutes, originally the act of July 28, 1866.

In the Circuit Court, the State moved to remand each of the cases to the Supreme Court of the State.

An order was entered remanding the cases, and

the defendants in each have sued out the present writs of error under section 5 of the Act of March 3, 1875.

The general question, therefore, is, whether the causes, or either of them, were removable into the Federal Court on both or either of the grounds set forth in the petitions for such removal.

Each case will be separately presented in this brief.

Assignment of Errors.

The circuit erred in each case.

1st. In entering an order remanding the same.

2d. The pleadings and exhibits show that each of the cases was removable and was duly removed into the Circuit Court on two grounds:

FIRST. Under the second section of the Act of March 3, 1875, "as being a suit of a civil nature arising under the Constitution and laws of the United States."

SECOND. Under the Act of July 28, 1866, now section 640 of the Revised Statutes, as being a suit against members and directors of a corporation other than a banking corporation, organized under the laws of the United States, for a liability or alleged liability of such defendants as such directors and members, who have, and in their answer

state, a defense arising under the laws of the United States.

The case against the Kansas Pacific.

Statute provisions relating to Quo Warranto Suits.

The Statute of Kansas abolishes the writ *quo warranto*, and substitutes a *civil action*.[1]

Defines a "civil action" in section 3531.[2]

The plaintiff asks a judgment of dissolution against the corporation under section 4198, and a Receiver, &c., under section 4199.[3]

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[1] **Sections reprinted from Compiled Laws of Kansas of 1879:**

"(4192) Sec. 652. The writ of *quo warranto* and proceeding by information in the nature of *quo warranto*, are *abolished*, and the remedies heretofore obtainable in those forms may be had by *civil action*."

Compiled Laws of 1879, sections 4192, 4193.

[2] **Civil action defined.**

"(3531) Sec. 10. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and in their place there shall be hereafter but *one form of action, which shall be called a civil action*."

[3] **Judgment in Quo Warranto Civil Actions.**

"(4198) Sec. 658. When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the action, have a separate action for the damages at any time within one year after the judgment. The Court may give judgment of ouster against the defendant, and exclude him from the office, franchise or corporate rights; *and in cases of corporations, that the same shall be dissolved*."

"(4199) Sec. 659. *If judgment be rendered* [in a *quo warranto* civil action] *against any corporation*, or against any persons claiming to be a corporation, the Court may cause costs to be collected by execution against the person claiming to be a corporation, or by attach-

Substance of the pleadings.

PETITION: THE GRAVAMEN OF THE PETITION of the State filed by its Attorney-General, is, that the *consolidation* of January 24, 1880, between the defendant company and the Denver Pacific and Union Pacific is illegal, and for that reason it asks a judgment dissolving the Corporation, and for a Receiver and distribution of the Company's property.[1] The combined effect of the judgments asked in the two cases is to extinguish all right in the defendant Company, and also the Consolidated Company, to maintain and operate the road for the use either of the public or United States.

The petition sets out the Articles of consolidation at length, which Articles claim throughout to be framed under the laws of the United States. Record, p. 11. The petition charges that these Articles of consolidation were "unlawfully and wrongfully en-

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ment against the directors or other officers of the corporation, and *may restrain any disposition of the effects of the corporation, appoint a Receiver* of its property and effects, take an account, and make a distribution thereof among the creditors and persons entitled."

[1] THE PRAYER *of the petition* of the Attorney-General is as follows:

"Whereupon, and on consideration of the foregoing declarations, charges and informations, the said Attorney-General prays the advice and judgment of the said Court in the premises, and due process of law against the Kansas Pacific Railway Company, in this behalf to be made to answer to the State of Kansas by what warrant it claims to have, use and enjoy the liberties, privileges and franchises aforesaid; and further, by what *warrant it claims, and has exercised the right to put the said railroad and its appurtenances into the possession and under the control of the above mentioned* FOREIGN *railroad company*, and by what warrant it claims the right to maintain such *foreign corporation* in such possession, or in the enjoyment and exercise of the franchises and privileges bestowed by the State of Kansas, exclu-

tered into" by the defendant company. Record, pp. 10, 11, 18, 19. The petition, therefore, although not in *terms*, does in *substance and in fact*, set forth a case, irrespective of the answer, arising undert he laws of the United States.

ANSWER. IN THE ANSWER it is claimed, *first*, that Congress, by the Ninth Section of the Act of July 1, 1862, *created the association of natural persons* then composing the original Leavenworth, Pawnee & Western Railroad Company, on their acceptance and consent, *a corporation of the United States.* Record, pp. 23, 24.

The only road ever built, namely, the line of road mentioned in the petition and answer, and every inch thereof, was built under the provisions of the Acts of Congress and by means of the subsidy which Congress gave. Record, p. 24.

The foregoing defense rests *wholly* upon the construction and effect of the Acts of Congress, known as the Pacific Railroad Acts, as creating a distinct federal corporation, with distinct franchises and

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sively on said Kansas Pacific Railway Company; and the said Attorney-General prays that upon a due hearing hereof, the said respondent company be adjudged to have *forfeited* all its rights, liberties and franchises, and to be ousted from the same, *and that the said corporation be thereupon dissolved;* and the said Attorney-General further prays that it be further adjudged that the said franchises, granted to the defendant by the State, have become relinquished, abandoned and forfeited to the State of Kansas, and *that the same be resumed to the State, and that the State take possession of the said railroad,* with all its appurtenances and fixtures, as public property, and make such disposition thereof as may be thought necessary to secure the rights of the State, saving the just interests of creditors and other third parties guiltless of the frauds, wrongs and injuries herein charged against the said corporation, and the members thereof."

powers to build and use the road, although bearing the name of an existing State corporation, to the creation of which corporation, Congress, by the act, asked no assent of the State, although it may have acted on such assent. If this view is a sound one, the *only* question in the case is one arising under the Act of Congress.

The defendants' answer further claims, *second*, that if the foregoing is not the true view of the Acts of Congress, then under the previous and subsequent Acts and Resolutions of the Legislature of the State of Kansas, the effect of the Pacific Railroad Acts, on being accepted by the company, was directly to confer upon the company, as respects the road in question, the *additional* powers, rights, privileges and immunities specified in the Acts of Congress, and which are inconsistent with the existence of the right of forfeiture now asserted by the State. Record p. 24, *et seq.*

If this is the correct view of the meaning and effect of the legislation of Congress, then this is a ground of defense which also rests principally, if not wholly, upon the construction and effect of the Acts of Congress as creating distinct *federal* franchises and powers, under which franchises and powers the right to construct, maintain and use the road exists, a right which excludes, by necessary effect, any co-existing right of the State to forfeit the same. The validity of this defense cannot be determined without a construction of the meaning and effect of the Acts of Congress.

The position of the *State* must be that both of the

foregoing defenses set up in the answer are unsound, and that the powers conferred by Congress, though conferred for national purposes upon the defendant corporation, and though conferred with the assent of the State, both express and implied, are subject to its sovereignty, and do not originate any rights over which the *superior* power of the State to forfeit and dissolve the corporation, does not extend the same as if all the powers of the company had been granted by the State itself.

The company maintains that it logically and necessarily follows from the Acts of Congress and from the facts appearing in the pleadings, that the State cannot defeat the purposes of Congress by dissolving the corporation and distributing its property to its creditors and stockholders.

The answer of the Kansas Pacific Company further claims, *third*, that Congress could constitutionally authorize the defendant corporation to *consolidate* the road which it built under the provisions of the Acts of Congress, with connecting roads of the Pacific system; and did so authorize it in the Pacific Railroad Acts, which Acts were passed at the request of the State of Kansas, which subsequently recognized the validity of said Acts, and consented thereto, as well as to the action of the defendant company in filing its acceptance of said Acts and constructing its road thereunder. And the answer claims that the consolidation of January 24th, 1880, which is brought into question in this suit, was authorized

both by the Acts of Congress and the laws of Kansas; certainly, to say the least, it was not incompatible either with the laws of the United States, or of Kansas.

Record, pp. 27–34.

This defense made by the answer presents the question of the *nature and extent of the power* given by Congress to *consolidate* and the *effect* of such consolidation. The validity of this defense cannot be determined without the construction of the Pacific Railroad Acts, and particularly of the sections thereof which confer the power to consolidate.

Other Facts Disclosed by the Record.

The following facts also appeared in the pleadings and record when the petition for removal was filed.

The Leavenworth, Pawnee & Western Railroad Company, whose name was afterwards changed to the Kansas Pacific, was originally chartered by the *Territory* of Kansas in 1855.

Charter of 1855, Record, page 43.
Amended charter of 1857, Record, page 49.

At that time the western boundary of the Territory of Kansas was on the summit of the Rocky Mountains in what is now Colorado. Kansas was admitted into the Union as a State in 1861.

12 Stats. at Large, 26.

The Territory of Colorado was organized in 1861 and included a large portion of what had previously been Kansas.

12 Stats. at Large, 172.

The Kansas Company within the time limited accepted the Pacific Railroad Acts.

Record, p. 23, fol. 29.

Under the Act of July 3, 1866 (14 Stats. at Large, 79), and under the Act of March 3, 1869 (15 Stats. Large, 324), the Kansas Pacific was authorized to change its line from the 100th meridian in Nebraska, where it was originally required by Congress to build it, and to locate it westwardly through Kansas into Colorado to the City of Denver; and it built its road on this line under such Congressional authority. By the aforesaid Act of March 3, 1869, the Kansas Pacific was authorized to make the connection with the Union Pacific from Denver to Cheyenne, by means of the Denver Pacific, which act made the last-named company, to all intents and purposes, a part of the Pacific system.

The record further shows that the consolidation has been ratified by 199,084 shares out of 200,000 shares of *Kansas Pacific* stock, and the latter stock has to that extent been surrendered and exchanged for the stock of the new company.

Record, page 29, fol. 39.

Every share of the *Denver Pacific* stock has been surrendered and exchanged for stock of the new company.

Record, page 29, fol. 39.

Every share of the $41,000,000 of the old *Union Pacific* stock, except 1,930, has been surrendered and exchanged for the stock of the new company.

The consolidation has been ratified by corporate and stockholders' votes.

Record, pp. 29, 30, 90–127.

The consolidation was officially reported to Congress in 1880, and since that time has been recognized and acted upon by every department of the Government.

Record, p. 30.

See Opinion of Attorney-General DEVENS, Record in Directors' Case, p. 14.

Government directors for the new company have been regularly appointed by the President of the United States.

Record, page 30.

The consolidated company has issued $10,000,000 new stock, making the stock of the consolidated company now outstanding $60,868,500, which increase was approved by the auditor of railway accounts.

Record, page 30, fol. 41.

The stock of the consolidated company is held by more than 4,000 persons in Europe and America.

Record, page 31, fol. 42.

The new company has issued its own negotiable securities, amounting to several millions of dollars, and incurred expenditures and liabilities to more than $75,000,000, all of which was done before the State of Kansas commenced these suits (p. 31).

The subsidy debt of the Kansas Pacific Company

to the United States now amounts to over $12,000,000.

Record, page 31, fol. 42.

There is a first mortgage debt of equal amount due in the future to bondholders of the company, and also a large mortgage indebtedness of the company subordinate to the government debt.

Record, page 31.

Kansas Legislation Showing State's Assent to the Pacific Railroad Acts.

The record further shows that on the 5th day of February, 1862, the Rollins Bill (which afterwards became the Pacific Railroad Act of July 1, 1862) was introduced into the House of Representatives.

Record, page 55.

The Kansas Legislature passed a Joint Resolution on March 4, 1862, "earnestly requesting Congress to pass an act to secure the early completion of a railroad from the Missouri River to the Pacific Ocean, by way of Fort Riley, as is more fully set forth in the Rollins Bill; and requesting this resolution to be transmitted to the Kansas Senators and Representatives in Congress, with the request that they immediately lay the same before it."

Record, page 55.

The Rollins Bill gave express power to consolidate.

Record, page 56.

By this resolution the defendant claims the *State assented, in advance*, to the Pacific Railroad Act of July 1, 1862.

On the same 4th day of March, 1862, the Kansas Legislature passed the Consolidation Act, *in anticipation* of the passage of the Act of Congress of July 1, 1862, directing it to be *published at once*, and to take effect *immediately*.

Record, page 50.

This act shows on its face, by its reference to the Pottawatomie Treaty, that it was intended to embrace the Kansas Pacific Company. Both the Joint Resolution and the Act were passed, as the defendant claims, to influence the pending action of Congress; that Congress framed its legislation accordingly, and provided for consolidation in the sixteenth section of the Act of 1862; and did not require the formal assent of the State, as that had already been given. The defendant also claims that the State, by this action, made an offer to Congress, which was accepted and acted upon, and is irrevocable, and that the policy of the State in this regard, and as respects this road, has never been altered by any legislation since that time.

Congress fixed for the Kansas Pacific both terminal points, one in Missouri and the other in Nebraska, and also prescribed the route of the road. The road was not built on the Territorial chartered route, but on the route prescribed by Congress. For mistaken averments of the petition as to route, see

Record, page 10.

For denials and statements of the answer in this regard

Record, pages 23, 34.

After the Kansas Pacific had filed its acceptance of the Act of Congress, and after it had commenced the work of construction thereunder, the Legislature of Kansas in March, 1864, again recognized the Act of Congress and passed a Joint Resolution,

"That Congress be earnestly requested to amend the Act so as to require the Leavenworth, Pawnee and Western Company or their assigns to make Wyandotte, Lawrence, Topeka, and other Kansas towns, points on said road."

Record page 57.

To which Congress responded by the amendatory act of July 2d, 1864, section 12.

Record, page 82.

This joint resolution the defendant claims to be an implied, if not express, assent to all parts of the Act of 1862, including the power to consolidate, with the exception of those parts specially complained of.

Record, page 57.

July 1st, 1865, the defendant company filed its map of route to the 100th meridian to connect with the main line.

In 1865, the Kansas Legislature passed another Act authorizing the *consolidation* of

"Any railroad company in the State forming a continuous and connected line with any other railroad company either in or out of the State."

Record page 54.

July 3d, 1866, Congress passed an act authorizing the Kansas Pacific to abandon the route by Republican to the 100th meridian and to adopt a route

running westwardly through the State, by virtue of which Act the Smoky Hill Route, on which the company's road was afterwards built, was adopted.

14 Stats. at Large, 79.

In 1867, the Legislature of Kansas passed a Joint Resolution asking that additional subsidies be given to the Kansas Pacific.

Record, page 58.

In 1868, the Legislature of Kansas passed a Joint Resolution asking Congress to give authority to extend the Kansas Pacific road along the Central route to the Pacific coast, and to give it the same subsidy in lands and bonds as had been given to the Union Pacific.

Record, page 59.

On the 3d day of March, 1869, Congress responded, in part, to this resolution, and required the defendant company to extend its road to the City of Denver, and form a connection with the Union Pacific at Cheyenne, through the medium of the Denver Pacific. This was another implied assent on the part of the State of Kansas to all that had been done by Congress up to that time.

Act reprinted. Record page 89.

It thus appears from the answer and the acts of Congress, that the road of the Kansas Pacific, from Kansas City to Denver and the Leavenworth branch (which is all the road that company ever built or owned), was constructed wholly under the authority of Congress and on a route prescribed by it, and

not under or upon the route prescribed by the Territorial charter.

After the road was finished, the Legislature of the State of Kansas passed another Joint Resolution "urgently requesting Congress to compel the Union Pacific to afford to the Kansas Pacific the same facilities for the transportation of freight and passengers, in regard to the rate, time and transportation, as is contemplated by law, without any discrimination or injury to the said Kansas Pacific."

Record, page 60.

This was, as the defendant maintains, another implied, if not express, assent to Congress conferring new powers upon and exacting new duties of the defendant company.

Congress again responded by the Act of June 20, 1874, requiring all of the Pacific railroad companies and their officers, under penal sanctions, to operate the said roads for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one continuous line without discrimination, so as to secure to each of the said roads the same facilities as to rate, time, transportation, without any discrimination of any kind in favor of or adverse to the road or business of any or either of said companies.

18 Stats. at Large, 111.

Argument.

THE REMOVAL of *Kansas Pacific Case* from the State Court is authorized.

FIRST, by the second section of the Act of March

3, 1875, "*as being a suit of a civil nature arising under the Constitution and Laws of the United States.*"

SECOND, by the Act of July 28th, 1866, now section 640 of the Revised Statutes.

First Ground at Removal.

FIRST. *This is a case of a civil nature arising under the laws of the United States.*

The Act of March 3, 1875, Section 2, enacts:

"That any suit of a civil nature at law or in equity, brought in any State Court, when the matter in dispute exceeds, exclusive of costs, the sum or value ot $500, and arising under the Constitution or laws of the United States,"

may be removed into the Circuit Court of the United States.

The following are the elements and the only elements of removability under the foregoing clause of the Act:

1. The Suit in the State Court must be a "suit of a civil nature at law or in equity."
2. It must involve more than $500.
3. It must arise under the Constitution or laws of the United States.

That this was a "suit" in the State Court within the accepted and settled meaning of the word "suit" will not be denied

That it is a suit of a "civil nature" is plain upon the settled doctrine of the Courts aside from stat-

ute (*infra*, p. 42). But all doubt, if any could exist, that it is such a suit, is removed by the Statute of Kansas, abolishing *quo warranto* writs and informations and substituting the remedy of "*civil* action," and requiring a judgment purely *civil in its nature* to be rendered (*supra*, p. 4).

That it is a suit, as shown by the pleadings, *arising* under the Constitution and laws of the United States, is settled by the judgment of this Court in the Railroad Company vs. Mississippi, 102 U. S., 135.

Sufficient if there **appears** *to be a federal question.*

Upon these facts, shown in the record, and appearing from the public legislation of the State and of Congress, so clearly is the case federal in its nature that no Court in which it is tried can take a single step without being required to deal with and construe the Acts of Congress relating to the defendant company.

In short, if the propositions of fact and law on which the answer is founded are sound, they exclude any right of the State to a judgment of forfeiture.

Whether they are sound, this Court may or may not decide on the present writ of error; it being sufficient to sustain the right of removal, that a "claim" of federal right, protection, immunity, or privilege, "*can fairly be made*" upon the pleadings and record.

People of Illinois vs. C. B. & Q. Ry. Co., 16 Fed. Rep., 706, 707, HARLAN, DRUMMOND and BLODGETT, JJ., concurring.

This seems to express the true test of removability based upon the subject matter of the suit.

"The only point," says the Court in the case last cited, "we can consider here [on a motion to remand] is, whether there *appears* to be such a question in the case [*i. e.*, a federal question], not whether the immunity claimed by the defendant can be sustained" in the final judgment.

It seems to me that the above comprises the substance, of all that need be said to show that the cause was removable under the Act of 1875. But some elaboration of the subject is probably justified by the importance of the cause and the novel phase in which the questions present themselves.

The denial on the part of the State of removability must be based upon one or both of the following propositions:

1. This is not a "suit of a *civil* nature," within the meaning of the Removal Act, because (*a*) this language does not embrace *quo warranto suits by a State*, and, possibly, because (*b*) it does not embrace any case where a *State* is the adverse party.

Or,

2. This suit does not *arise* under a law of the United States.

I will now endeavor to maintain the proposition:

I.

THAT THIS IS A SUIT OF A "CIVIL NATURE" WITHIN THE MEANING OF THE REMOVAL ACT.

That this is a suit of a civil nature is shown,

1st. By the legislation of Kansas and the judicial construction of similar legislation.

2d. By the decisions of the Courts irrespective of any controlling statute.

3d. By a consideration of the intrinsic and essential nature of the inquiry which a *quo warranto* suit presents, and of the judgment, whether for the State or the defendant, which must be entered as the result of such inquiry.

1. THE LEGISLATION OF KANSAS MAKES THIS SUIT A CIVIL ACTION, BOTH AS TO ITS FORM AND NATURE.

The purpose and effect of the legislation of Kansas are to make the remedy here sought a *civil* remedy *in form* as well as in its *nature*. It enacts that there shall be but "one *form* of action, which shall be *a civil* action" (Sec. 4192, quoted *supra*, p. 4).

The statute abolishes writs of "*quo warranto*, and proceedings by *information* in the nature of *quo warranto*," and enacts "that the remedies heretofore obtainable in those *forms* may be had by a *civil action*" (Sec. 3531, quoted *supra*, p. 4).

It was, at common law, the mode of proceeding by "*information*," and perhaps the power to impose a fine or punishment upon the usurper, that gave to it the *appearance* or *form* of a criminal proceeding.

Under the Kansas statute the proceeding is no longer even in *form* criminal.

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Very anciently, at common law, a fine or punishment might be imposed upon the usurper, followed by imprisonment, but this power has long since passed into desuetude in England, and has rarely, if ever, been exercised in the United States.

But under the Kansas statute, which enacts that the action SHALL be a *civil action*, of course no *criminal* judgment could be rendered, even if the statute were silent as to the nature of the judgment. But the statute is not silent. It says a "judgment of ouster" against individual defendants may be rendered "with *damages*," if damages have been claimed (Sec. 4198, *supra*, p. 4), and for "costs" (Sec. 4199, *supra*, p. 4), and impliedly excludes the power to inflict a fine or other punishment.

And "*in cases of corporations*" it enacts that judgment may be given "that the same shall be dissolved" (Sec. 4198), and the Court may "*restrain* any disposition of the effects of the corporation, appoint a *receiver* of its property and effects, take an *account*, and make a *distribution* thereof among the creditors and persons entitled"--powers strictly appertaining to the exercise of *civil*, or distinguished from *criminal*, jurisdiction.

Judicial construction of similar legislation: If the point had never been adjudged, it would, therefore, be clear enough that the present suit is, under the statutes of Kansas, "a civil action" and nothing else—civil in its *form* as well as in its *nature*.

But the exact point has been repeatedly adjudged. The Kansas statute making *quo warranto* a civil action was borrowed literally from the *New York*

Code. The New York Code was construed by the Court of Appeals in The People vs. Cook, 8 N. Y., 70, 71. WILLARD, J., speaking for the Court, says:

"The mode of testing the title of a party to an office, prior to the Code, was by information in the nature of a *quo warranto* (2 R. S., 581). Although this partook of the nature of criminal proceedings, by reason of the judgment being in some cases followed by a fine; yet it was classed with civil remedies, in the third part of the Revised Statutes. The 428th section of the Code abolishes the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, and enacts that the remedy theretofore obtainable in those forms may be obtained by *civil actions*. The present action was brought under those provisions and is therefore a *civil action*. The decisions of the Court below are to be reviewed upon the principles applicable to *civil actions, and not by those which prevail in criminal proceedings, when the latter differ from the former*. The parties, in fact, stand in the same relation of equality to each other as in other civil actions. Each, on being defeated, is liable to the other, as well for the ordinary costs of the action as for an extra allowance. This is so whether the people or Benjamin Welch, Jr., be considered as the real plaintiff."

S. P. Furman vs. Clute, 52 N. Y., 576.
People vs. R. R. Co., 1 Lansing, 308.

So in *Missouri*, whose Code extends the Civil Practice Act to informations in the nature of *quo warranto* (1 Rev. Stats. Mo., 1879, Sec. 3585, p. 613).

Thus, in the State *ex rel.* Bornefield vs. Kupferle, 44 Mo., 154 (1869), CURRIER, J., delivering the opinion of the Court, said: "This is an information in the nature of a writ of *quo warranto*, the writ itself having long since fallen into obsoleteness and disuse. *The information initiates a civil proceeding* to try the right to an office, although in its origin and form it partakes of a criminal character, and is a substi-

tute for the original writ of *quo warranto*. But the proceeding is essentially civil, and that is the established doctrine in this State (Brison vs. Lingo, 26 Mo., 496; McElhaney vs. Stewart, 32 Mo., 379; Hequembourg vs. Lawrence, 38 Mo., 535). *The information, answer and reply are subject to the rules governing corresponding pleadings in strictly civil causes—the information, in this regard, answering to the petition in civil suits.* The question whether, in a given suit, the *onus* of proof is shifted from the complaining party to his antagonist, must be determined upon an examination of the pleadings, and not by reference to the form and history of an obsolete writ."

S. P. State vs. Vail, 53 Mo., 97.
State vs. Upton, 64 Mo., 415.

So in *Colorado* the Court says:

"Whatever may be the form of the action prescribed by the Legislature, whether by information in the nature of a *quo warranto*, or whether by the ancient writ of *quo warranto or by complaint under the Code* in a civil action, the objects to be attained are identical, and the proceeding is in substance civil, instituted for the determination of purely civil rights."

R. R. Co. vs. People, 5 Colorado, 39; *Ib.*, p. 60.

So in *Florida*, it is purely a civil action.

Robinson vs. Jones, 14 Flor., 256.

2. PROCEEDINGS IN QUO WARRANTO ARE PURELY CIVIL ACTIONS ON GENERAL PRINCIPLES, ASIDE FROM ANY STATUTE DECLARING THEM TO BE SUCH.

Long before the Legislatures of New York and Kansas had declared an information in the nature of a *quo warranto* to be a civil proceeding, the Courts had decided that such was its nature. It never had in this country the criminal character which an-

ciently attached to the same proceeding in England. Some of the numerous authorities to this effect are given in the note.*

Analogous and illustrative decisions as to what are "civil actions," in cases relating to eminent domain, mandamus, forfeitures under internal revenue acts, &c.

A similar objection to the one here urged, was made in Boom Company vs. Patterson (98 U. S., 403). That case originated in a proceeding under the laws of Minnesota to condemn private property under the *State's right of eminent domain.* The case was removed into the Circuit Court of the United States, and a question was there raised as to its jurisdiction. The position of the company, which made the objection, and the answer of the Court thereto, are stated by Mr. Justice FIELD (pp. 406, 407), as follows:

"The position of the company," says FIELD, J., "on this head of jurisdiction is this, that the pro-

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* The State vs. Hardie, 1 Iredell, 42, GASTON, J., one of the ablest of American Common-law judges, says:

"In the country of our ancestors, and in ancient times, when any of the offices or franchises appertaining to sovereignty, and therefore called royal, were supposed to be held or exercised without lawful authority, the remedy was by suing out the writ of *quo warranto*, to inquire by what warrant the supposed usurper supported his claim, in order to determine the right thereto. This was said to be in the nature of a writ of right for the King, and from what we have seen of the pleadings in it, bore little or no resemblance to a criminal prosecution. * * * Indeed Mr. Justice WILMOT, in Rex vs. Marsden, 3 Burr., 1817, declares positively that it is *not* a criminal prosecution, but a civil writ at the suit of the crown, though Chancellor KENT, in People vs. Utica Ins. Co., 2 Johns. Cases in Chancery 117, speaks of it as a criminal proceeding. Be

ceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty has no right to interfere by any of its departments. This position is undoubted a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several States, providing for just compensation for property taken, is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. *But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a*

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this as it may, the remedy certainly much resembled, if in truth it were not a real action; and, like other actions of that family, was subjected in its prosecution to inconvenient delays. On this account, like most real actions, in process of time it became much disused, and its place was supplied by the information in the nature of a *quo warranto*. Originally *this* was a criminal proceeding. In it the usurpation was charged as an offense, and the offender, upon conviction, was liable to be punished by fine and imprisonment. Such, however, were the inconveniences attending the information, as a mode of trying the mere question of right to the office or franchise, that although it never entirely lost its form as a criminal proceeding, it was so modelled as to become substantially a civil action. A fine, indeed, was imposed upon conviction; but it was nominal only. No real punishment was inflicted, and it became *before our resolution*, the general *civil remedy* for asserting and trying the right, in order to seize the office or franchise, or to oust the wrongful possessor."

In State Bank vs. The State, 1 Blackf. (Ind.) 271-2, HOLMAN, J., says: "A *quo warranto* information is a criminal proceeding only

proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, the owners of the land on the one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a CIVIL SUIT, *and its determination derogates in no respect from the sovereignty of the State.*

The Act of March 3, 1875, provides that *any suit of a civil nature, at law or in equity,* pending or brought in a State Court, in which there is a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district, and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. *Paul vs. Virginia*, 8 Wall., 177. And in *Gaines vs Fuentes* (92 U. S., 20), it was held that a *controversy* between citizens *is involved in a suit whenever any property or claim of*

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in name and in form; in its nature it is purely a civil proceeding. * * * The primary and only material object of the proceedings, is not the infliction of pains or penalties as in criminal proceedings; but to deprive the individual members of the supposed corporation of privileges they claim to enjoy above the lot of the citizens in general. The fine inflicted on a conviction is merely nominal. It is so immaterial a part of the proceedings, that the books on the subject of corporations have almost lost sight of it. The conclusion of the judgment, it is true, is said to be with a *capias pro fine*. But this is more the form than the substance of the judgment, as in all civil actions founded on tort; for when the proceedings are by writ of *quo warranto*, the conclusion of the judgment is, that the defendant be in mercy, &c., as in civil actions founded on contract. * * * So that, with us, the fine may be very properly left out of the case; and then the proceedings are so conclusively of a civil nature, as to form no colorable pretense for this constitutional objection" (*i. e.*, "No person shall be put to answer any criminal charge, but by presentment, indictment or impeachment").

In Commonwealth vs. Wray, 3 Dall., 490 (1799), the Attorney-General of Pennsylvania obtained a rule to show cause why an in-

the parties, capable of pecuniary estimation, is the subject of litigation, and is presented by the pleadings for judicial determination Within the mean- of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy."

In Washington Improvement Company vs. Kansas Pacific Railway Company (5 Dill., 489), the Circuit Court held that a proceeding by *mandamus* in the State Court under the Statute of Kansas to compel the defendant company to perform a corporate act, was "a suit of *civil nature at law*," within the meaning of the Removal Act of March 3, 1875; and upon proper application, might be transferred to the Circuit Court of the United States. The opinion of

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formation in the nature of a writ of *quo warranto* should not be issued against a county treasurer.

SHIPPEN, J., said: "The present is the first instance, that we recollect, of an application of this kind in *Pennsylvania*; and on opening the case, it struck us to be within the 10th section of the 9th article of the Constitution, which declares, 'that no person shall for any indictable offense be proceeded against criminally by information,' except in cases that are not involved in the present motion. But, on consideration, it is evident that the Constitution refers to informations, as a form of prosecution, to punish an offender, without the intervention of a grand jury; whereas an information, in the nature of a writ of *quo warranto*, is applied to the mere purposes of trying a civil right and ousting the wrongful possessor of an office."

In Commonwealth vs. McCloskey, 2 Rawle, 369 (1830), GIBSON, C. J., at p. 381, says: "It is declared in the Constitution (article nine, section tenth), 'That no person shall, for any indictable offense, be proceeded against criminally by information,' except in certain specified cases. But every information is in form, a criminal proceeding; and the framers of the Constitution were guilty of pleonasm; unless they meant to assert that there are cases in which it may be used substantially as a civil remedy. Now, it so happens that the best of the elementary authors has asserted the same thing. As a method of criminal prosecution, the information in the nature of *quo warranto* has long fallen into disuse, the fine being merely nominal, and the effect of the judgment to oust an intruder;

Mr. Justice MILLER, on the motion to remand, will be found to be alike instructive and conclusive. He says:

"This motion must be denied. This is a '*suit of a civil nature at law*,' within the meaning of the Act of Congress of March 3d, 1875. The statutes of Kansas so treat it both in the procedure and the judgment to be rendered (Gen. Stats. of 1868, p. 766). * * * *

[So here, the same statutes thus treat the present suit, both in its form and in the judgment to be rendered.]

"This litigation relates to property rights, and the controversy is a suit within the language, purpose and policy of the removal act. The writ of *mandamus* in such cases as this does *not retain its prerogative character*, and this is really a *civil proceeding* to determine the rights of the parties in respect to property. *It is my individual judgment that the words 'suit of a civil nature at law' do not*

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and thus restricted, it is now used to try title to a franchise (3 Black. Com., 263). In fact, it contains all that is valuable in the ancient writ of *quo warranto;* to which, with its uncouth forms and interminable pleadings, the necessity which there often is of giving redress in some shape, would compel us to return. Can it be doubted, then, that the convention, containing as it did many of the ablest lawyers in the State, had particularly in view the preservation of this proceeding as a civil remedy? Even were that doubtful, yet the point has been settled by cotemporaneous construction and long practice. *The Commonwealth vs. Wray*, 3 Dall., 490, in which it was expressly ruled, was within nine years from the adoption of the Constitution; since when, it has been followed as a precedent, by different judges, through six successive cases, in which the principle was reasserted without the expression of a doubt, either on the bench or at the bar."

Respublica vs. Wray, 2 Yeates (Pa.), 429 (1799). Information in the nature of a *quo warranto* against one assuming and exercising the office of Treasurer of Cumberland County, the Court said: "A

relate to the form of the suit or proceeding so much as to its substance and nature, and are not to be taken in the restricted sense of being limited to a common law action strictly, but rather in contradistinction from suits in admiralty, in equity and proceedings of a criminal nature. The present proceeding is, therefore, a suit at law within the meaning of the removal act. The Supreme Court, in cases familiar to the bar, has defined the word 'suit,' and has not placed any narrow construction upon it."

5 Dillon, 489.

So, the case of the *Railroad Company vs. Mississippi, supra*, was, as stated above, a *mandamus* suit, in which the STATE of Mississippi was the plaintiff.

In Rising vs. Cribbs, 1 Dillon, 181, 184, Mr. Justice MILLER said:

"The third section of the Act of July 2d, 1864 (13 Stats. at Large, 351), introduces into the federal

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mere civil right will be tried on this information prayed for, and the method of procedure is no violation of the Constitution."

In Commonwealth vs. Comrs. of County of Phila., 1 Serg. & R., 385, TILGHMAN, C. J., says:

"But it is objected that this is not a proper case for an information in the nature of a *quo warranto*. Although a *criminal* proceeding in *form*, it is in *substance* but a civil one, and therefore clear of the prohibition in the 10th section of the 9th article of the Constitution of the Commonwealth, which relates to criminal proceedings only."

To same effect see

4 Cowen, 102, note.
State vs. Smith, 48 Vt., 482.

"The object of the information, as now employed both in the courts of England and America, is substantially the same as that of the ancient writ of *quo warranto*, and though still retaining its criminal form, it has long since come to be regarded as, in substance, a civil proceeding, instituted by the public prosecutor, upon

courts a new and very important rule of evidence, as follows:

"In the courts of the United States there shall be no exclusion of any witness on account of color nor in civil actions, because he is a party to or interested in the issue tried."

"The phrase '*civil actions*,'" says Mr. Justice MILLER, "is here used undoubtedly as opposed to *criminal* actions; and, therefore, includes suits in chancery as well as suits at law. That the phrase is used in contradistinction to criminal action is held by the Supreme Court in the case of Green vs. The United States, 9 Wallace, 655."

The phrase "civil actions" was also defined by Mr. Justice MILLER, in the United States vs. 10,000 cigars, Woolworth, 123.

"Mr. Justice MILLER: This is a writ of error to the District Court. The property, which is the subject of this controversy, was seized for a violation of the

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the relation of private citizens, for the determination of purely civil rights."

High's Extraordinary Legal Remedies, § 591.

"*Quo warranto* is a strictly civil proceeding resorted to for the purpose of testing a civil right."

High, § 603, and cases cited in note 3.

ENGLISH AUTHORITIES: Blackstone, speaking of an information in the nature of a writ of *quo warranto*, says in Book 3, p. 263: "This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only."

In Rex vs. Marsden, 3 Burr., 1817, Mr. Justice WILMOT (1765):

"The old *writ of quo warranto* is a *civil* writ at the *suit* of the crown; it is *not a criminal* prosecution. It probably dropped with the *cires*, which is the more likely because the *quo warranto* was to be determined IN *cire*. But, be that as it may, this was the true *old* way of inquiring of usurpations upon the crown by holding fairs or markets, viz., by writs of *quo warranto*.

"Then informations in the nature of a *quo warranto* came into use and supplied their place.

"In all the cases I could find (and I searched all that I could

internal revenue laws. Robeson Brothers filed their claim as the owners of the property, denying its liability to condemnation. In the course of the trial the claimants offered themselves as witnesses in their own behalf, and were admitted against the objection of the district attorney. The ruling of the District Court upon this objection is alleged for error, and presents the question for our determination here.

"The proviso to the 3d section of the Act of July 2, 1864 (13 Stats. at Large, 351), declares 'that in he Courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in the issue tried.'

"This enactment was intended to effect in the Federal Courts the same change in the law of evidence as had been made by many of the States, namely, to admit the testimony of witnesses previously incompetent on account of interest, or of being parties to the suit. *The phrase 'civil actions,' includes actions at law, suits in chancery, proceed-*

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meet with) all informations of this sort were filed by the Attorney-General; *none* by the king's *coroner* and attorney. And this is natural and easily to be accounted for, because it is a *private* right of the crown."

Rex vs. Francis, 2 Term, 484, King's Bench, 1788:

"A verdict having been found for the defendant in a *quo warranto* information to show by what authority he claimed the office of Alderman of Cambridge, a new trial was moved for on the ground that the verdict had been given against the weight of evidence. It was objected, on showing cause, that no new trial could be granted in an information in the nature of *quo warranto;* * * * but

"*The Court* granted a new trial, saying, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Strange* in which a new trial had been granted."

" * * * But the writ of *quo warranto* was a writ of right more resembling a *real* than a *personal action.* The information was at first considered as a *criminal,* though it is now considered as a *civil* proceeding."

2 Kyd on Corp., 439.

ings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the Government. It is used here in contradistinction to prosecutions for crime.

"The suit before us is a civil action within the meaning of the statute. It is prosecuted according to the usual course in admiralty. It is an inquiry into a right of property. The provision cited, therefore, will allow these claimants to testify, unless it has been repealed or modified by some other act of Congress."

3. THE SUIT IS SHOWN TO BE A CIVIL SUIT BY ITS INTRINSIC NATURE, AND BY THE NATURE OF THE JUDGMENT TO BE RENDERED; AND AS SUCH IS WITHIN THE REMOVAL ACT, WHICH EMBRACES "*any* SUIT OF A CIVIL NATURE AT LAW OR IN EQUITY ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES."

It may be contended by the State that although the Removal Act is broad enough to embrace in its terms a suit in *quo warranto* containing a federal element, yet the nature of the suit is such, that although a federal element be present, it must be considered as *impliedly* withdrawn or excepted from the Act.

This objection is founded upon the mistaken conception that there is something *so peculiar* in the nature of a *quo warranto* proceeding by a State against a corporation chartered by it, that such a case is impliedly excepted from the federal jurisdiction even although the corporation relies in its defense upon the protection of an express Act of Congress. This leads to an examination into the nature of a suit in *quo warranto* against a corporation. Upon such an examination, it will be seen

that such a suit essentially involves, not a question of sovereignty, but simply a question of the violation of contract.

THE DARTMOUTH COLLEGE CASE (4 Wheat., 518) has established the principle in our jurisprudence that the charter of a private corporation and the privileges and franchises therein granted, when accepted, constitute a *contract* between the State and the corporation, protected by the clause of the National Constitution that no State shall pass any Act impairing obligations of a contract; and like other contracts, it is beyond the power of the State, without the assent of the other party reserved or given, to annul the contract or impair its obligation.

There is, it is true, an *implied condition* in the charter in the nature of a condition subsequent, that the corporation will keep the contract by a due exercise of the powers granted, and will not break it by violating those powers, and that if it does not keep the condition the State may elect to terminate its existence.

But whether the corporation has kept or broken the condition, which is the sole ultimate inquiry in a *quo warranto* suit against it, is always a judicial, and never a legislative question, unless the Legislature has reserved the power to decide that for itself.

As a charter is a contract between the State and the corporation, a *quo warranto* suit against the corporation involves primarily and necessarily, not questions concerning the *sovereignty of the State, but questions concerning a compact—a contract—*

entered into between the State and the corporation, to the validity of which the assent of both parties is essential, and the subject of judicial inquiry in such a case is simply whether the corportion has broken the contract, that is, whether it has violated the implied condition upon which it was incorporated.

In such a suit the State is to be regarded merely as one of the parties to the contract in question. The subject matter of the inquiry in the suit is not rights of sovereignty of the State, but its right as a party to a contract to have a judicial enforcement of it; and the sole inquiry in such a suit, namely whether the contract has been broken or not, is, in its nature, civil and not criminal. In short, a *quo warranto* against a corporation is nothing but a suit by the State founded upon an alleged breach of a contract; a contract *sui generis*, it is true, but a contract still, and for the appropriate but peculiar judgment, to which, if the contract is found to be broken, it is by the law entitled, to wit, a judgment that the contract be dissolved, technically called a judgment of forfeiture,or under the Kansas Statute, of dissolution and administration of its property. The judgment of forfeiture is not in the nature of a criminal punishment or penalty, any more than a judgment of forfeiture in favor of the grantor or lessor of real estate for breach of a condition subsequent by the grantee or lessee; or a declaration by Congress of the forfeiture of a land grant for breach of condition subsequent.

The question whether a corporate charter has been kept or broken, although essentially one of *contract*, and not of *prerogative or sovereignty*, and

although in its nature judicial, is one between the State and the corporation (which, for federal jurisdictional purposes, is a citizen of the same State), and, therefore, not within the cognizance of the federal tribunals in any form, original or appellate, in any case where their jurisdiction depends upon citizenship, *i.e.*, upon the *character of the parties*, as distinguished from the *nature of the suit*.

On the other hand, such a question, even between such parties, is within the constitutional grant of federal judicial power, and within the Removal Act of 1875, in every case where, under legislation of Congress, applicable to that corporation, the determination of the right to forfeit depends upon the construction and effect of the Constitution, or any statute of Congress. In every such case the jurisdiction of the federal tribunals is based upon the nature of the *subject matter*, and not the character of the parties, and federal jurisdiction, when resting upon the *nature of the case*, equally attaches, whether a *State* or an *individual* is the adverse party.

Prior to the Act of March 3, 1875, the federal jurisdiction in such a case (that is, a case between a State and a domestic corporation, involving a federal element) could only be exercised under the 25th section of the Judiciary Act, as neither the 11th nor 13th section of that Act gave the Circuit Court any jurisdiction. The Act of March 3, 1875, for the first time authorized such a case to be removed into the Circuit Court.

As such a case—involving a decision of the question whether, under the legislation of the State and

of Congress applicable to the corporation, the right of the State to forfeit its charter and take possession of its road exists—is, as I have shown, essentially civil and not criminal; the only limitation upon the right of *removal* is that the value of the subject matter in controversy must exceed $500.

It will be observed that the Act of March 3, 1875, as to the removal of *civil* cases, is as broad, except as to the requirement of a pecuniary value of $500, as the grant of judicial power in the Constitution of the United States. As the pleadings set up a federal defense, it would hardly be contended that a writ of error would not lie from the Supreme Court of the United States to a judgment of forfeiture against the company rendered by the Supreme Court of Kansas. If this is a *civil* suit, as I think has been demonstrated, the right of removal into the Federal Court under the Act of 1875 is just as clear as the right to have the federal questions involved reviewed by the Supreme Court on a writ of error to the highest Court of the State. Simply because the case is *quo warranto* does not necessarily exclude the federal jurisdiction. Many cases of *quo warranto* might be brought by a State which could unquestionably be removed. Thus, if the State should bring *quo warranto* against any *federal corporation*, the defendant could of course remove the suit. If, for example, a suit in *quo warranto* should be brought by the State of Nebraska against the government directors of the Union Pacific Railway Company, it could unquestionably be removed into the Federal Court.

The test, and only test, is, whether there is a *fed-*

eral right, *i. e.*, one resting upon the Constitution of the United States or an Act of Congress, involved in either the claim made by the plaintiff, or in the defense pleaded thereto.

If the defendant company is right in the effect which it claims for the Acts of Congress, the State has no right to a judgment of forfeiture. The primary, and probably only, function of any Court, State or Federal, which shall try this case, will be to decide upon the effect of the Pacific Acts of Congress in their application to the railroad constructed by the defendant company under those acts.

The decision of such a question appropriately belongs to the Courts of the United States.

Two objections to the foregoing views answered.

It may, indeed, be suggested that this proceeding in *quo warranto* must be regarded as an inquest strictly between the sovereign State of Kansas and its corporate creation; and is so far affected by that sovereignty that due respect for it forbids the transfer of the inquiry to any other forum, and that any other forum is, in fact, unable to enforce, consistently with that respect, its judgment.

The answer is that *rights of contract and rights which arise under the laws of the United States* are sharers in the sovereignty of the United States; and that this sovereignty in turn becomes involved with any inquiry in which "what arises out of the legislation of Congress" becomes "the right or privilege "or claim or protection or defense, in whole or in "part (R. R. Co. vs. Mississippi *supra*), of the

" party by whom it is asserted." It is no disrespect to the one sovereignty that it is called to arbitration by the other, in the forum designated for such cases by their mutual compact in the Constitution. In the case at bar, the claim of the defendant is that out of the legislation of Congress it has come that the State of Kansas is bound, so far at least as the exercise of the franchises in respect of this railroad is concerned, to allow the corporate existence of the defendant or to allow its merger in, or transfer of its road by consolidation to another corporation; that whatever the reserved power of the State may be for condition broken, to forfeit the right to represent its sovereignty by using any franchise coming from the State, it is still bound in its turn not to withdraw capacity to use the delegated sovereignty or franchise which it has from the United States, and is so bound by a contract or vested right which exists under the protection of the United States.

The sovereign power of the State conferring being is no answer to the *right to be*, if that right rests upon contract. That there is such a contract is claimed in this regard by the defendant, and that it must be so held upon a true construction of the laws of the United States. Nor is it an answer to say that such a contract is one conferring an indefeasible right upon this company to exist within the State, and yet against the State, and that the sovereignty of the State forbids. That is a question of the rights of States, and, therefore, belongs to the Courts of the United States. As to either of these questions, jurisdiction is conferred by the existence of the question.

It may be suggested, "Suppose the federal right claimed by the defendant company is adjudged against it, the State, if it proved its case, would then be deprived of the right to a judgment of dissolution, since such a judgment could not be pronounced by a *federal* tribunal; and, therefore, the case is not removable." But what is there to disable or prevent a federal Court from rendering such a judgment? If such a judgment were rendered by the federal Court, it would be final, and not interlocutory, and nothing would remain for the State Court to do.

Another decisive answer to this objection is found in the 5th section of the Act of March 3, 1875.

As all federal questions in the case supposed, would thus be eliminated, the Federal Court could then remand the cause to the State Court, that it might proceed to trial and judgment upon the rights of the parties under the laws of the State.

Action of Congress.

Since 1862, Congress has interfered for the express purpose of protecting its interests in the Pacific roads, or some of them.

See "Joint resolution for the protection of the interests of the United States in the Union Pacific R. R. Co., the Central Pacific R. R. Co.," &c., April 10, 1869 (16 Stats. at Large, 56).

Removal Act of July 28, 1866; Rev. Stats. § 640, discussed further *infra* p.

Whenever Congress has made provision for suits against the Pacific companies, it has *always directed them to be brought in the Federal Courts.*

Act March 3, 1873 (17 Stats. at Large, 508).

Act June 20, 1874 (18 Stats. at Large, 111).

Act June 19, 1878 (20 Stats. at Large, 169).

Implied limitations and exceptions to language of the Removal Act not permissible.

AS THE REMOVAL ACT OF 1875 IS THUS SHOWN TO EXTEND BY ITS TERMS TO ANY CASE OF A CIVIL NATURE IN WHICH A STATE IS THE PLAINTIFF, AND A CORPORATION OF THE STATE IS THE DEFENDANT IF SUCH CASE INVOLVES A FEDERAL ELEMENT, IT IS NOT PERMISSIBLE TO INTRODUCE BY JUDICIAL CONSTRUCTION, IMPLIED LIMITATIONS AND EXCEPTIONS WHICH THE ACT HAS NOT MADE.

It will be remembered that the whole judicial power of the United States so *far as it depends upon the nature of the cause as distinguished from the character of the parties* is embraced in the first clause of the second section of the third article of the Constitution, in these words:

"The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The Act of March 3, 1875, confers jurisdiction on the Circuit Court both original and by way of removal from the State Courts, of civil cases involving

five hundred dollars, and "arising under the Constitution or laws of the United States."

It is anticipated that in some form, arguments will be urged against the right of removal, that is to say against the jurisdiction of the Circuit Court of the case against the Kansas Pacific, based not only upon the supposed "non-civil nature of the suit" (which has been already considered) but upon the fact that the *State of Kansas*, in its sovereign capacity is the plaintiff and the *Court of Kansas* the only tribunal, competent to take, try and decide the controversy between the parties. Such objections are not new. An objection that the STATE is not bound to submit to the jurisdiction or judgment of the Federal court is precisely the same which was made by the State of Virginia in the historic case of Cohens vs. Virginia, 6 Wheat. 264. Cohens was indicted in the State Court in Virginia for selling lottery tickets contrary to the statutes of the State. He attempted to defend under an act of Congress, to wit: the charter of the City of Washington, which authorized the drawing of lotteries. The State Court gave judgment against the defendant, who took a writ of error under the 25th section of the Judiciary Act. The State moved to dismiss the writ of error on two grounds: *first*, the State of Virginia is a defendant (that is, a defendant in the writ of error); *second*, that no writ of error lies from the Supreme Court of the United States to a State Court.

The following extracts from the judgment of the great Chief Justice are made, not so much for the purpose of reminding the Court of the propositions

there decided, namely, th t where the jurisdiction of the federal court is founded upon the *character of the cause*, that is, where the case is one arising under the constitution or a law of Congress, "the nature of the case is everything, the character of the parties nothing," and that the jurisdiction extends without discrimination or limit to cases of any character in which a State or an individual is a party, as to recall to the Court his argument against the right to insert by judicial construction in the grant of judicial power implied exceptions and limitations.

MARSHALL C. J., says:

"The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State and the other a citizen of that State?

"The 2d section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the CHARACTER OF THE CAUSE, *whoever may be the parties.* This class comprehends 'ALL *cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority.*' This clause extends the jurisdiction of the Court to *all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.*

"In the second class, the jurisdiction depends entirely on the CHARACTER OF THE PARTIES. In this are comprehended 'controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union. * * *

"A CASE IN LAW OR EQUITY consists of the *right of the one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.* Congress seems to have intended to give its own construction of this part of the Constitution, in the 25th section of the Judiciary Act; and we perceive no reason to depart from that construction.

"The jurisdiction of the Court, then, being extended by the letter of the Constitution to *all* cases arising under it, or under the laws of the United States, it *follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule* the words which its framers have employed.

* * * * * * * * *

"With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important *limitations on the sovereignty of the States*, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases, of every description, arising under the Constitution or laws of the United States. FROM THIS GENERAL GRANT OF JURISDICTION, NO EXCEPTION IS MADE OF THOSE CASES IN WHICH A STATE MAY BE A PARTY. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution, the subordination of the State governments to that Constitution; the great pur-

pose for which jurisdiction over all cases arising under the Constitution and laws of the United States, is confided to the judicial department, *are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.*" * * *

"It has been also urged, as an additional objection to the jurisdiction of the Court, that cases BETWEEN A STATE AND ONE OF ITS OWN CITIZENS, DO NOT COME WITHIN THE GENERAL SCOPE OF THE CONSTITUTION; AND WERE OBVIOUSLY NEVER INTENDED TO BE MADE COGNIZABLE IN THE FEDERAL COURTS. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last. *This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this Court could not establish the demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this Court cannot inquire whether the Constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State.* * * *

"If the constitution or laws may be violated by proceedings instituted by a *State against its own citizens*, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all cases* arising under the constitution and laws?

"After bestowing on this subject the most attentive consideration, the Court can perceive no reason founded *on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as*

originally given, extends to all cases arising under the Constitution or a law of the United States WHOEVER MAY BE THR PARTIES."

These views have not since been questioned; and they were recently applied to a case having a federal element, removed under the Act of 1875, in which the State of Mississippi was the plaintiff and a corporation of the same State was the defendant. (Railroad Co. vs. Mississippi, 102 U. S., 135).

In Martin vs. Hunter's Leassee (1 Wheaton, 304) similar *implied limitation or restriction* on the grant of federal judicial power arising out of the supposed invasion of the rights of the States in subjecting the judgments of their Courts to federal revision even in cases involving a federal element, was unsuccessful.

The Court of Appeals of Virginia having entered a solemn judgment declining obedience to a mandate of this Court, on the ground that the 25th section of the Judiciary Act was not authorized by the Constitution of the United States, the Supreme Court was necessarily required to consider the extent of the judicial power of the Union. As in that case the question was whether a title to lands was protected by a treaty, the Court had particularly to consider the clause extending the judicial power "to all cases in law or equity arising under the Constitution, laws of the United States, and treaties made under their authority." It was contended that an *implied limitation or implied restriction* upon this power and upon the appellate jurisdiction of the Supreme Court existed, because a power

of revision over the judgments of a State tribunal was

"inconsistent with the genius of our government and the spirit of the Constitution; that the latter [the Constitution] was never designed to act upon State sovereignty, but only upon the people, and that if the power exists it will materially impair the sovereignty of the States and the independence of their courts" (p. 343). But "we cannot," says the Court, "yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent." (*Ib.*)

The following conclusions in that case were reached by the unanimous judgment of the Court:

1. That the judicial power was *imperative* as to the cases to which it extended.

2. That it extended to ALL *cases* enumerated in the Constitution.

3. That it was the *character of the case, and not the character of the Court,* whether State or Federal, which gave the jurisdiction to the tribunals of the Union.

This memorable judgment put an end to one of the boldest and most dangerous of the many attempts made, since the adoption of the Constitution, by the States and the State tribunals, to undermine or curtail the federal jurisdiction. The reasoning of the Court is irresistible, and the judgment has been acquiesced in, without contest or question, from that day to this.

The exact point in judgment in that case is that an implied restriction upon or an implied exception to

the federal jurisdiction, does not exist by reason of the fact that the *Court* which renders a final judgment in any case involving a federal element, is a court or even the highest court of a State.

It is pertinent, and may be useful, to recall some of the observations of MR. JUSTICE STORY, who gave the opinion of the Court, respecting the inadmissibility of recognizing *implied* restrictions upon the grant of the judicial power, for they are equally applicable, whether the implied restriction is sought, as in that case, to be derived from the character of the State tribunals, or, as in Cohen's case, from the sovereign character of a State of the Union, or, as in the case now at the bar, from the nature of the cause which the State presents, and which it is insisted is not, for some occult reason, within federal cognizance, even if it be a civil suit containing a federal element.

Having shown that the clause of the constitution, "the judicial power *shall* extend," &c., "is imperative, the question," says STORY, J., "is as to the *cases* to which it shall apply. The answer is found in the constitution itself. The judicial power shall extend to ALL *the cases* enumerated in the constitution. As the *mode* is not limited, it may extend to all such cases, *in any form*, in which the judicial power may be exercised. It may, therefore, extend to them in the shape of *original or appellate jurisdiction*, or both; for there is nothing in the nature of the case which binds to the exercise of the one in preference to the other" (1 Wheat., 333), * * * "*It is the* CASE, *then, and not the* COURT, *that gives the* (federal) *jurisdiction.* If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification of the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text

be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible" (pp. 338, 339) * * * After unfolding the argument in favor of the validity of the 25th section of the Judiciary Act, he concludes: "*We find no clause in that instrument* (the constitution) WHICH LIMITS THIS (the judicial) POWER; AND WE DARE NOT INTERPOSE A LIMITATION WHERE THE PEOPLE HAVE NOT BEEN DISPOSED TO CREATE ONE" (p. 351).

It results from the foregoing,

That neither the fact that the *State* of Kansas is the plaintiff, nor the further fact that the removal of the cause will withdraw it from the jurisdiction of the State tribunals, nor anything in the character of the cause, which is purely civil since it exclusively involves the construction of the Pacific Railroad Acts as to the power to consolidate, and the effect of such consolidation on the right of the State to forfeit the charter of the company and take possession of its road, which will justify the Court in introducing by construction, *i. e.*, judicial legislation, into the Removal Act and into the Constitution (for the language of each is the same) an implied restriction or exception against the words of act and of the constitution.

The Federal Character of the Case at the Bar.

THE PACIFIC RAILROAD ACTS DO INTRODUCE A FEDERAL ELEMENT INTO THE CASE AND ARE A CONCLUSIVE DEFENSE TO THE STATE'S SUIT:

1st. BECAUSE THOSE ACTS ARE INCONSISTENT WITH, AND THEREFORE EXCLUDE THE ASSUMED

RIGHT OF THE STATE TO A FORFEITURE OF THE COMPANY'S CHARTER EVEN IF IT HAD NOT CONSOLIDATED.

2d. THOSE ACTS CONFER THE POWER TO CONSOLIDATE, WHICH POWER THE ANSWER SHOWS TO HAVE BEEN DULY EXERCISED. THIS IS FATAL TO THE STATE'S CASE:

1. BECAUSE THE ALLEGED ILLEGAL CONSOLIDATION IS THE GRAVAMEN OF THE COMPLAINT, WHICH IS FULLY ANSWERED IF THE POWER TO CONSOLIDATE EXISTS.

2. THE EFFECT OF THE CONSOLIDATION IS TO CREATE A NEW CORPORATION UNDER THE ACTS OF CONGRESS WHICH OWNS THE ROAD THAT PREVIOUSLY BELONGED TO THE KANSAS PACIFIC, WITH THE RIGHT TO USE THE SAME, WHICH OWNERSHIP AND RIGHT TO USE THE STATE CANNOT DEFEAT OR FORFEIT.

The considerations, hereinbefore presented, are applicable to any case in *quo warranto* having a federal element of any character, and were intended to show that merely because a case is one of *quo warranto*, it is not necessarily excluded from the federal jurisdiction, and that whether a given case is within federal cognizance, depends alone upon the presence of a federal element.

It has so far been assumed as sufficiently apparent, from the public legislation of Kansas and of Congress applicable to the defendant company, that a federal element exists, or *may be fairly claimed to exist*, in the case, which latter is all that need appear to entitle the defendant to a removal thereof into the Circuit Court. *Supra*, p. 18.

In some form the objection will be made by the State, that there is no federal element in this case, and it is, therefore, not removable.

It is anticipated that the objection will assume, substantially, this form: the Kansas Pacific is a pure creation of the State, and it is fundamental—unlying all—that it must fulfill its duties to the State, and it cannot set up as against the State a right to exist if it violates such duties; that although the defendant may have received from the United States additional corporate franchises to build and use its road, yet these do not impair or restrict the right of the State to have a dissolution of the corporation if it violates its duties to the State; that the State is not herein seeking to disturb or question any power or franchises it derived from the United States, but is pursuing the corporation it created *and no other*, and seeks a forfeiture only of franchises derived from it, and that the defendant cannot plead its duties to the United States in avoidance of its paramount duties to the State.

This objection makes it necessary to consider the legal *status* of the Kansas Pacific as respects the State of Kansas and the United States.

It must be remembered that the only road ever built was the one for which the defendant received the subsidy of lands and bonds from the United States; that it is that road which the State complains was illegally transferred to, and is being illegally operated by, the consolidated corporation; wherefore the State insists that it has the right to have the corporate existence of the company and the franchise to use its road adjudged forfeited, and the road and

property of the company taken possession of by the Court and administered and distributed to creditors and stockholders.

When the State's counsel say they only seek a forfeiture of the franchises which came from the State, what do they mean? Do they mean that the Company may, after forfeiture, still continue to exist with the right to carry out the obligations of Company to the United States and the public, or not? What they, in fact, mean, appears from the prayer for judgment—total dissolution of the Company and full distribution of its property.

It must also be remembered that the *gravamen* of the petition is the "unlawful and wrongful" consolidation. Certain statutes of Kansas are specified in the petition enacted subsequent to the Pacific Railroad Acts, which, it is alleged, are "incompatible" with the articles of consolidation or with the right to consolidate, but this suit is not founded on a right to a forfeiture for a violation of these subsequent acts, but solely on the ground of the illegal consolidation—these Acts of Kansas being specified in the petition merely to show that they were "incompatible" with the consolidation.

The answer to the position of the State that it has, notwithstanding the Pacific Railroad Acts, the right to forfeit the charter of the Kansas Pacific if it violates the Territorial Charter or the laws of the State, is twofold:

I. The Pacific Railroad Acts having been passed at the request of the State of Kansas and afterwards

assented to by it, whereby Congress adopted, with the consent of the State, the Kansas Pacific Company into the Pacific system, the Acts of Congress are the paramount law of the Kansas branch of that system, which acts are inconsistent with, and therefore exclude the existence of the State's assumed right to forfeit the charter of the company. This would be so if no consolidation had been made or attempted and the Kansas Pacific corporation were still in active existence and in the actual use and operation of its road.

The foregoing proposition rests upon the axiomatic principle in our jurisprudence that when Federal and State legislation cover precisely "the same ground, they cannot co-exist" (People vs. Comp. Genl. Trans-Atlantique, 107 U. S., 63, per MILLER, J.), and the Federal is the paramount law.

Whether the provisions of the Acts of Congress are inconsistent with the right of the State to a judgment of forfeiture is a federal question of a purely civil nature, without any criminal or even penal admixture, and hence a case presenting such a question as a ground of defense is removable, under the Act of 1875, to the Circuit Court, because it is a case arising under the laws of the United States.

II. The Pacific Railroad Acts, which were assented to by the State and accepted by the company, expressly authorized the consolidation which the State makes the basis of its suit for a forfeiture of the company's charter, and the consolidation so

made was not "incompatible" with the laws of the State of Kansas.

If the foregoing proposition be true (which is the real and only question in the case on the merits), it presents an inquiry of a civil nature, without any punitive ingredient therein, and a suit, whatever its form or name, wherein such a defense is made, resting upon the Acts of Congress, is removable under the Act of March 3, 1875, as being a case arising under the laws of the United States.

If Congress by an enactment valid by its intrinsic force or by reason of the State's assent thereto, gave to the Kansas Pacific Company the power to consolidate its organization and stock with the other Pacific companies, and that power was exercised, two consequences result, each of which is fatal to the right of the State to demand a forfeiture of the company's charter:

1st. As the ground of forfeiture is the alleged illegal consolidation, if the power to consolidate exists and was duly exercised, the whole basis of the *quo warranto* suit is gone. The Act of Congress constitutes a complete answer to the *quo warranto* proceeding, and as the State is the adverse party, it is especially fitting and proper that the question should be adjudged in the first instance, as well as ultimately, not in the Courts of one of the suitors, but in the tribunals of the Union.

2d. The Pacific Railroad Acts (with the consent of Kansas) gave to the Kansas Pacific Company the power to unite and consolidate its

organization and stock with those of the other constituent companies—that is, they gave *an alienable quality* to the company's right to build and operate and use its road; and the effect of the consolidation is to create a new corporation under the Acts of Congress, which new corporation owns and is authorized and *required* to operate and use the road, for all the purposes specified in the Acts of Congress, which right and duty it is not within the power of the State to defeat.

The first proposition above, viz., that the Pacific Railroad Acts of Congress in reference to the Kansas branch are inconsistent with the State's assumed right of forfeiture, is argued at length in a Brief prepared by me in this case for use in the Circuit Court, and herewith submitted as part of this argument. See that brief, pp. 35–64.

The right of the State to terminate the existence of a private corporation created by it rests upon the charter contract with the corporation. Such right may be *express*, as where an unconditional power of repeal is reserved by the State when the corporation is created. It may be *implied*, as where the charter or organic law of the corporation is silent as to the effect of a violation of corporate duty, in which case, as the grant of franchises is upon an implied condition subsequent, the State may have a forfeiture for a breach of such condition. The State may after such breach elect not to take advantage of it or may waive it. So it may beforehand agree not to terminate the corporate existence or renounce its right to a forfeiture.

In the exercise of any constitutional power, Congress could undoubtedly deprive the State of the power to dissolve a State corporation to the injury of the National Government. Florida Tel. Case, 96 U. S., 1; United States vs. Union Pacific R. R. Co., 91 U. S., 72. But we have here no abstract question as to the power of Congress in this respect, for the State of Kansas has assented to the Pacific Railroad Acts, and all their provisions are binding upon it in virtue of such assent, if not otherwise.

Applying the foregoing principles that the State may waive a breach of corporate duty or agree beforehand not to forfeit a corporate charter for breach of implied conditions, the result is that if the exercise of *such right of forfeiture by the State of Kansas is inconsistent with the provisions of the Pacific Railroad Acts, the State by its assent to said acts must be taken to have agreed not to exercise the right if it otherwise might have done so.*

In the Brief referred to, it is attempted to be shown

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That the main line and branches are upon the same footing as respects powers, subsidies, construction, duties, and operation..... 37

That the powers declared and reserved to Congress in respect of branches are inconsistent with the right of the State to forfeit..... 38

That the reserved *right of Repeal* is inconsistent with the right of the State to forfeit..... 41

That the enumerated rights expressly secured to the United States would be defeated by a judgment of forfeiture..... 45

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And inconsistent with the Act of April 10, 1869, in which Congress asserted its right of forfeiture..... 48
And inconsistent with the *additional powers* granted by Congress to the Kansas Pacific Company..... 64

The second proposition above, viz., that Congress, by the Pacific Railroad Acts, validly conferred upon the Kansas Pacific Company the power to consolidate with the two other companies and that this power was duly exercised, is also argued in the same Brief (pp. 50–84).

In that Brief it is also attempted to be shown that the *consolidation in question was authorized*, and in the consideration of this subject the following topics are discussed at the pages indicated:

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The meaning of the word "*incompatible*," as used in Sec. 16, Act July 2, 1864, in connection with the power to consolidation.....79–84

Since the foregoing propositions arise upon the Acts of Congress and the Legislation of the State, and lie at the basis of this controversy, it is highly

desirable to both parties that the Court should give its judgment thereon rather than on any inconclusive ground.

Indeed, it is not perceived how this Court can affirm the order of the Circuit Court remanding the cause without denying both of these propositions.

In addition to the cases cited in the other brief, in respect of the legal *status* of the *State* corporations adopted into the Pacific system, reference is made to the following opinions of MILLER and McCRARY, JJ., in the telegraph litigation between the Western Union Company and the Union Pacific Railway Company concerning the main line and the Kansas branch.

In Telegraph Company vs. Union Pacific Railway Company (1 Federal Reporter, 745; S. C., 1 McCrary, 541), which involved a construction of the Pacific Railroad Acts in respect of the nature of the telegraph franchises conferred upon the company by those Acts, Judge McCRARY decided that the Union Pacific Railway Company was not authorized to alienate its telegraph franchises and disable itself by any form of contract from itself performing its telegraph duties, and was not authorized to lease its telegraph franchises to the Western Union Telegraph Company, which should exclusively do the commercial telegraph business thereon.

1 Federal Reporter, 745; same case, 1 McCrary, 541, 547, 548.

Afterwards, in another case of the Western Union Telegraph Company vs. The Union Pacific Railway Company, relating to the telegraph line on the Kan-

sas Pacific road, it appeared that the Kansas Pacific Railway Company, on the first day of October, 1866, made a contract with the Western Union Telegraph Company, which provided that the railway company *should do no commercial or paid telegraph business from any station where the telegraph shall have an office, without the consent of the latter.*

"This, in my judgment," says McCRARY, J., "amounts to an alienation of the right to transact business for the public generally, for pay as a telegraph company; and that right is the most valuable part of the franchise of a telegraph company. It follows that the contract is beyond the power of the railway company (the Kansas Pacific Company), unless the authority to make it can be derived from the Idaho Act of 1864," which the Court proceeds to consider.

In this case "it was conceded that the Kansas Pacific, which was originally chartered by an Act of the Legislature of Kansas, had by virtue of the State charter authority to make the contract in question; but it was insisted that, by accepting the terms of the Acts of Congress making it a branch of the Union Pacific, it became subject to the laws of the United States relating to that road and its branches, and was thereby disabled from making such a contract."

"I am of opinion," said Judge McCRARY, "that, *by accepting the terms of the Acts of Congress, and receiving its benefits, the Leavenworth, Pawnee and Western Railroad Company became subject to all the terms and conditions imposed by those acts, and that neither it nor its successors could enter into a contract not authorized thereby—anything in the original State charter to the contrary notwithstanding.*"

W. U. Tel. Co. vs. U. P. Ry. Co., 3 Federal Reporter, 1, 4, 5; S. C., 1 McCrary Rep., 418, 422.

Subsequently the last named case again came before Mr. Justice MILLER on the Circuit (3 Federal Reporter, 721 S. C., 1 McCrary, 581), who affirmed the soundess of Judge MCCRARY'S view. Mr. Justice MILLER says:

"It is said that the Kansas Branch of the Pacific Railroad Company was the successor of a corporation organized under the laws of Kansas, and not by the Acts of Congress of 1862 and 1864, called "The Pacific Railroad Acts," conferring on that company the right to build a railroad and telegraph; and that because the Kansas branch of the Pacific Railroad Company does not owe its existence as a corporation to the United States or to any law of the United States, that, therefore, it is not bound by the provisions which forbid it from making a contract such as that made with the Western Union Telegraph Company.

But this proposition cannot be maintained. The corporation (the Kansas Pacific) which accepted the grant of the United States of millions of money, by way of subsidy, and millions of acres of land, and many other advantages, *must be held to have accepted the entire Act of Congress, with all the conditions which it imposed.* This was held in the Supreme Court of the United States in the recent Sinking Fund Cases (99 U. S. Supr. Ct. Rep., 700), in which the validity of the Thurman Act, requiring those railroads to provide a sinking fund for the payment of their debt, was resisted by the Central Pacific Railroad Company, organized under the laws of California, on the ground that Congress could impose no such obligation upon that road. This proposition, though urged upon the Court very forcibly, and much relied upon in Mr. Justice FIELD'S dissenting opinion, was overruled by the Court; and it is held that, in accepting a grant made by Congress to those roads, it bound itself by all the provisions of the Act of Congress for the government of the companies.

3 Fed. Reporter, 732, S. C.,
1 McCrary, 581, 592.

In the same case, the Circuit Court had occasion to consider the status of the United States Telegraph Company, referred to in the special act of July 2, 1864, entitled, "An Act for increasing the facilities for telegraph communication between the Atlantic and Pacific States and the Territory of Idaho." The United States Telegraph Company thus referred to was incorporated under the laws of the State of New York, and it did not appear that the articles of incorporation were ever filed in the office of the Secretary of State. This was urged as a fatal objection to the existence of the corporation. Mr. Justice MILLER, in discussing the point, says:

"However this may be, it seems to me that the *Congress of the United States could adopt this imperfect and inchoate organization*, needing nothing but the filing of a copy of its articles of association in the office of the Secretary of State, and could, if it was the purpose of Congress to do so, confer upon it all the rights and powers which it has conferred upon the United States Telegraph Company."

Ib., 590.

There was no claim or pretense that the State of New York ever expressly assented to this Act of Congress.

3 Federal Reporter, 731; S. C., 1 McCrary, 590.

The other brief contains an argument to show that the adopted *State* corporations as well as the Union Pacific were alike the agencies of the Government for the performance of most important functions. But in that brief no reference was made to the case of the Union Pacific Railroad Co. vs. Peniston, 18 Wall., 32, which so decides and also declares that there is no

difference between the Union Pacific and the Kansas Pacific in this respect.

Mr. Justice STRONG, after referring to several provisions in the Pacific Railroad Acts, says:

"They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General Government. * * * NO DIFFERENCE CAN BE POINTED OUT BETWEEN THE NATURE, EXTENT AND PURPOSES OF THE AGENCY OF THE SEVERAL STATE CORPORATIONS AND THE AGENCY OF THE UNION PACIFIC RAILROAD" (*Ib.*, p. 33).

So also in the opinion of Mr. Justice DAVIS in the United States vs. The Union Pacific Railroad Co., 91 U. S., 72, it is declared:

"This enterprise was viewed as a national undertaking for national purposes * * * The whole act contains unmistakable evidence that *if Congress was put to the necessity of carrying on great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained, or the motive which influenced its action.*"

Congress, in 1871, in chartering the Texas and Pacific Railway Company with authority to build a road through the States of Texas and California and the intervening Territories, declared in express terms the legal *status* of the Company and the relation which the road sustained alike to the Government and to the two States, in this language:

"No act of the Company nor law of any State or Territory shall impede, delay or prevent said Company from performing its obligations to the United States."

What is here expressed is precisely what is implied in the Pacific Railroad acts of 1862 and 1864.

II.

THIS IS A CASE ARISING UNDER THE LAWS OF THE UNITED STATES.

If we have shown that this is a "suit of a civil nature" within the meaning of the Removal Act, but one other question remains, namely, whether the case is one *arising* under the Constitution or laws of the United States.

The case of the Railroad Company vs. Mississippi, 102 U. S., 135, which was a suit in *mandamus* by the *State* of Mississippi, is here precisely in point, and it is not necessary to look further.

The head note, which gives a correct general view of the case, is as follows:

"A petition for a mandamus was filed in one of her courts by the State of Mississippi, to compel a railroad company, a corporation existing under the laws of that State, to remove a stationary bridge which it had erected over Pearl river, a navigable stream on the line between Louisiana and Mississippi. Thereupon the company presented its petition, duly verified, praying for the removal of the suit into the Circuit Court of the United States, and alleging that the right to erect, use and maintain the bridge was vested by the company's charter; that its maintenance over said river was authorized by the Act of Congress approved March 2, 1868 (15 Stat., 38); that thereunder it became a part of a post road over which for several years the mails of the United States have been carried, and that therefore the suit impugns the rights, privileges and franchises granted by said act. The petition was accompanied by a bond with good and suf-

ficient security, conditioned as required by the Act of March 3, 1875, 18 Stat., part 3, p. 471. *Held*, that under the latter act the company was entitled to the removal prayed for."

MR. JUSTICE HARLAN, delivering the opinion of the Court, after stating the pleadings, says, on p. 139:

"From this analysis of the pleadings, and of the petition for removal, it will be observed that the contention of the State rests, in part, upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the part of the United States, as expressed in the Act of March 1st, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pear River, invokes the protection of the Act of Congress, passed March 2d, 1868. While the case raises questions which may involve the construction of State enactments, and also, perhaps, general principles of law, not necessarily connected with any federal question, the suit otherwise presents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an Act of Congress. If it be insisted that the claim of the State, as set out in its petition, might possibly be determined by reference alone to State enactments, and without any construction of the Act of 1817, the provisions of which are invoked by the State in support of its application for *mandamus*, the important, and, so far as the defense is concerned, the fundamental, question would still remain, as to the construction of the Act of Congress of March 2, 1868. That act, the company contends, protects the present stationary bridge against all interference whatever upon the part either of the State or of the Courts. In other words, should the Court be of opinion that the law is for the State, if the rights of parties were tested simply by the statutes of Alabama and Mississippi, it could not evade, but must meet and determine the

question, distinctly raised by the answer, as to the operation and effect of the Act of Congress of 1868.

"Is it not, then, plainly a case which, in the sense of the Constitution, and of the Statute of 1875, *arises* under the laws of the United States?

"If regard be had to the former adjudication of this Court, the question must be answered in the affirmative.

"It is settled law, as established by well considered decisions of this Court, pronounced upon full argument and after mature deliberation, notably in *Cohens vs. Virginia*, 6 Wheat., 264; *Osborn vs. Bank of the United States*, 9 *Id.*, 738; *Mayor vs. Cooper*, 6 Wall., 247; *Gold-Washing & Water Company vs. Keyes*, 96 U. S., 199, and *Tennessee vs. Davis*, 100 U. S., 257.

"That while the Eleventh Amendment of the National Constitution excludes the judicial power of the United States from suits in law or equity, commenced or prosecuted *against* one of the Untited States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State.

"That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted. That, except in the cases of which this Court is given by the Constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly,

"That it is not sufficient to exclude the judicial power of the United States from a particular case,

that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurdiction of that cause, although other questions of fact or of law may be involved in it.

"These propositions, now too firmly established to admit of, or to require, further discussion, embrace the present case, and show that, whether we look to the Federal question raised by the State in its original petition, or to the Federal question raised by the company in its answer, the inferior State Court erred, as well in not accepting the petition and bond for the removal of the suit to the Circuit Court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal."

We rely upon this case as clearly authorizing the removal of the case at bar.

It will be noticed that the suit was there brought by the *State of Mississippi*, as this suit is brought by the *State of Kansas*.

The judgment in the Railroad Company vs. Mississipi, did not, as we have already seen, announce any new doctrine. What is a case "arising under the Constitution and laws of the United States" had been before repeatedly decided in the same way by the Supreme Court.

"*Cases arising under the laws of the United States are such as grow out of the legislation of Congress*, whether they constitute the right or privilege, or claim or protection, or *defense of the party*, in whole *or in part*, by whom they are asserted."

STRONG, J., Tennessee vs. Davis, 10 Otto, 257, 264.

"Nor is it any objection that questions are involved which are not all of a Federal character. If *one* of the latter exists, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

SWAYNE, J., Mayor vs. Cooper, 6 Wall., 247, 252.

Second Ground of Removability.

This case is removable under § 640 of the Revised Statutes.

The Kansas Pacific case is also removable under the Federal Corporation Act of July 28, 1866, now section 640 of the Revised Statutes of the United States. This defendant is a corporation organized under the laws of the United States, either *de novo* or *quoad* every right in issue in this case. It has been well and clearly decided that the act embraces a suit brought by a *State* as well as by individuals.

State of Texas vs. Texas and Pacific Railway Company, 3 Woods, 308; Desty on Removal of Cases, p. 189, Sec. 24, and notes.

See further discussion of this Act, *infra*, p. 68.

The case against the Directors and Government Directors of the Union Pacific Railway Company.

THIS CASE IS REMOVABLE ON TWO GROUNDS:

1. Under the Act of March 3, 1875, as being a case arising under the laws of the United States.

2. Under the Federal Corporation Act of July 28, 1866, now section 640 of the Revised Statutes of the United States.

FIRST. *The case against the directors is one arising under the laws of the United States.*

What is said in the Kansas Pacific case in regard to what constitutes a case *arising* under the laws of the United States is equally applicable to the case against the directors.

They are within the decision of the Railroad Company vs. Mississippi, 102 U. S., 135.

The suit is a "civil action" under the Kansas statute, and in its essential nature and purpose.

See authorities and reasoning, *supra.*

The case involves more than $500.

The petitions for removal so state, and these statements are conclusive on a motion to remand.

Besides, it is evident that the defendants are the trustees and representatives of the company, and the Government directors represent the United States, and the real controversy is not the pecuniary value of their offices as directors, but the right of the Union Pacific Railway Company to use and exercise the franchise of operating the road in question.

Thus, a bill in equity to abate a public nuisance, by a person who suffers *special, individual damage*, may be maintained in the Federal Courts; and it is *not* necessary for the plaintiff to show that his *individual* damages exceeds $500, "*as the removal of the obstruction* [nuisance] *is the matter in controversy, and the value of that object must govern.*"

Miss. & Mo. R. R. Co. vs. Ward (bill to abate bridge), 2 Black, 485.

SECOND. *The case against the Directors of the Union Pacific Railway Company is also removable under Section 640 of the Revised Statutes of the United States.*

It is a matter of public history that this Removal Act was passed by Congress in view of the harassing litigation pending at the time in the Courts of New York against the Union Pacific Company and its officers. The avowed purpose of its passage was to protect the company and its officers, and through them the Government of the United States, the largest creditor of the company.*

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* The reasons for the passage of this section are thus stated by Mr. Bingham, who offered it in the House:

"MR. BINGHAM.—Mr. Speaker, I desire to say that the amendment offered by me has, as a separate bill, passed the Senate of the United States. The amendment which I offer, I have no doubt is a provision in which the Government of the United States is as deeply interested as any corporation or corporator of the United States. It concerns the interests of the whole country; and if it was deemed important for the public interests, as it certainly was, by the representatives of the people in Congress assembled to create these corporate trusts, it is certainly important to protect them in the Courts of the United States. * * *

"The general principle of the judiciary legislation of this country has been that rights accruing under the laws of the United States

This act not only authorizes suits against the corporation to be removed, but also suits brought against any *member* of such corporation, for any liability or alleged liability as such member, where there is a defense arising under the laws of the United States. A word of more comprehensive meaning than "liability" could not have been used, as it embraces suits *ex contractu* and *ex delicto.*

The defendant directors are sued as directors, or because they claim to be such, and not for any individual or personal liability.

Their defense is federal in its character—indeed it is exclusively federal.

The company of which they are directors exists and is organized by virtue of a consolidation authorized, as the defendant's plead, by the Pacific Railroad Acts of Congress.

If the Union Pacific Railway Company were the defendant on the record, as it is in fact, its right to a removal would be incontestible.

When suit is brought against corporate trustees who represent its rights, their right to a removal rests upon the same ground and is equally clear.

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were cognizable in the Courts of the United States; but it so happens that the general legislation of the country does not cover all classes of cases arising under the modern legislation by which you have invested large amounts of the public moneys and large quantities of the public lands in public improvements. I submit that the amendment proposed by me, and which has already been passed by the Senate without, as I understand, any objection, is entirely consistent with all our legislation, past and present."

This is substantially the entire debate on the subject. Congressional Globe, Vol. 82, 2d Session 40th Congress, 1867-68, p. 4431; *Ib.*, 4445.

This act does not require the pecuniary *amount or value* in dispute to be stated.

It does *not* limit the removal to a suit of *a civil nature at law or in equity.* It extends to "*any* suit."

It embraces suits by a *State* as well as by an individual; suits in *quo warranto* as well as any others.

State of Texas vs. The Texas & Pacific Railway Company, 3 Woods, 308, 1879, DUVAL and MORRILL, JJ.

This suit was brought by the State of Texas in a State Court. Its object was to recover of the defendant as forfeited certain land grants and reservations made and granted to it by the State of Texas. The right of removal was based upon the Act of Congress of July 28, 1868, Section 640 of the Revised Statutes.

"Upon one point alone," says the Judge, "have I found any difficulty. That is, that the suit being one instituted by the State of Texas, in one of her own Courts, and the State, as such, being sovereign and incapable of being sued, is not embraced within the meaning of Section 640."

The learned Judge, after discussing this question in the light of the 11th Amendment of the Constition, concludes:

"The language of Section 640 is very broad. It provides for the removal of 'any suit' falling within its provisions to the United States Circuit Court, and I believe it is comprehensive enough to

embrace suits brought by a sovereign State as well as by one of its citizens.

"From the most careful study and reference to authorities as bearing on this question, I am of opinion that the motion to remand should be refused, and it is so ordered."

JOHN F. DILLON,
For the defendants other than the Government Directors.

J. R. HALLOWELL,
District Attorney,
And
WAGER SWAYNE,
For the Government Directors.

SIDNEY BARTLETT,
J. P. USHER,
A. L. WILLIAMS,
Of Counsel.

111-449

OFFICE SUPREME COURT U. S.
FILED
JAN 23 1904
JAMES H. MCKENNEY, CLERK

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF KANSAS.

THE STATE OF KANSAS ex rel. W. A. JOHNSTON, as Attorney-General,
Plaintiff,
against
THE KANSAS PACIFIC RAILWAY COMPANY,
Defendant.

Quo Warranto.

Argument for the Defendant showing that the State of Kansas has no POWER TO FORFEIT THE FRANCHISE OF THE KANSAS PACIFIC COMPANY to operate and use its railroad built under the Pacific Railroad Acts of Congress; and that the CONSOLIDATION of that Company with the Union Pacific and Denver Pacific Companies was valid.

JOHN F. DILLON,
For the Defendant.

SIDNEY BARTLETT,
J. P. USHER,
A. L. WILLIAMS,
Of Counsel.

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In U. S. Circuit Court,

DISTRICT OF KANSAS.

STATE OF KANSAS, EX REL. ATTORNEY GENERAL,

AGAINST

THE KANSAS PACIFIC RAILWAY CO.

Argument for the Defendant.

An inquiry lying at the bottom of this case, concerns the relations of the United States and the State of Kansas, as respects the constructed railroad known as the Kansas Pacific, including the Leavenworth branch and the franchises connected therewith, especially the franchise to operate and use the same.

The State's claim in the petition is that this railroad is to all intents and purposes, a railroad of the State;—that all of the franchises pertaining thereto, including an alleged inalienable right to run and use it, came from the *State*, and not from the United States; that these franchises, like all other corporate franchises, are grants by the State, on a strict *condition subsequent* (such condition being obedience to its charter duties and the laws of the State) that the State has an absolute and unre-

stricted power of visitation over it, which it has never surrendered or waived, as against the company and the United States, notwithstanding the Acts of Congress applicable thereto, and has therefore the right, if the company has violated the law of Kansas, to have the corporate existence of the company, and the franchise to use its road, declared forfeited, and the property of the company taken possession of by the State or Court, and administered and distributed to creditors and stockholders.

Such is the necessary theory of the State's case. Such, indeed, is the express prayer of the petition.

What the State seeks in this suit :

The State is seeking a judgment of dissolution against the Kansas Pacific Company; to end its corporate existence, and be put in possession of its property.

See prayer of petition of the Attorney-General, quoted *infra*, p.

Judgment sought and its effect: At common law in a judgment upon a *quo warranto* information against a *corporation*, nothing was forfeited to the State but the corporate franchises, which came from the State; and the ownership of its property by the corporation does not terminate until its dissolution, and dissolution does not take place, according to the better opinion, until the judgment is not only entered, but executed.

High, Extraordinary Legal Remedies, 755.

In State Bank vs. the State, 1 Blackf. (Ind), 267, a very carefully considered case, it was held that a

judgment, which in addition to the judgment of seizure, directed the property "*into the custody of the State,*" was erroneous.

The statute of Kansas somewhat enlarges and modifies this common law effect of the judgment to be given in *quo warranto* proceedings against a corporation, by expressly directing that the Court *shall* enter a judgment dissolving the corporation.

(Compiled Laws Kansas, Sec. 4198, quoted *infra*).

The effect at common law of a judgment of dissolution against a corporation, is that the debtor may plead the judgment of dissolution in defense to an action of debt. The corporation is considered to be civilly dead.

People vs. Manhattan Co., 9 Wend., 382.
Dillon, Munic. Corp. (3d ed.), Sec. 169.

The corporation is ended by a judgment of dissolution; but its property, according to the modern view, remains a trust fund for the benefit of creditors and stockholders.

Bacon v. Robertson, 18 How., 480.

Sections reprinted from Compiled Laws of Kansas of 1879:

"(4192) Sec. 652. The writ of *quo warranto*, and proceeding by information in the nature of *quo warranto*, are abolished, and the remedies heretofore obtainable in those forms may be had by civil action."

Civil action defined.

"(3531) Sec. 10. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished,

and in their place there shall be hereafter but one form of action, which shall be called a civil action."

Judgment in Quo Warranto Civil Actions.

"(4198) Sec. 658. When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the action, have a separate action for the damages at any time within one year after the judgment. The Court may give judgment of ouster against the defendant, and exclude him from the office, franchise or corporate rights; *and in cases of corporations, that the same shall be dissolved.*"

"(4199) Sec. 659. *If judgment be rendered* [in a *quo warranto* civil action] *against any corporation*, or against any persons claiming to be a corporation, the Court may cause costs to be collected by execution against the person claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and *may restrain any disposition of the effects of the corporation, appoint a receiver* of its property and effects, take an account, and make a distribution thereof among the creditors and persons entitled."

Accordingly, THE PRAYER *of the petition* of the Attorney-General in this case is as follows:

"Whereupon, and on consideration of the foregoing declarations, charges and informations, the said Attorney-General prays the advice and judgment of the said Court in the premises, and due process of law against the Kansas Pacific Railway Company, in this behalf to be made to answer to the State of Kansas by what warrant it claims to have, use and enjoy the liberties, privileges and franchises aforesaid; and further, by what warrant it claims, and has exercised the right to put the said railroad and its appurtenances into the possession and under the control of the above mentioned *foreign* railroad company, and by what warrant it claims the right to maintain such *foreign corporation* in such possession, or in the enjoyment and exercise of the fran-

chises and privileges bestowed by the State of Kansas, exclusively on said Kansas Pacific Railway Company; and the said Attorney-General prays that upon a due hearing hereof, the said respondent company be adjudged to have *forfeited* all its rights, liberties and franchises, and to be ousted from the same, *and that the said corporation be thereupon dissolved;* and the said Attorney-General further prays that it be further adjudged that the said franchises, granted to the defendant by the State, have become relinquished, abandoned and forfeited to the State of Kansas, and *that the same be resumed to the State, and that the State take possession of the said railroad*, with all its appurtenances and fixtures, as public property, and make such disposition thereof as may be thought necessary to secure the rights of the State, saving the just interests of creditors and other third parties guiltless of the frauds, wrongs and injuries herein charged against the said corporation, and the members thereof."

Company's position as respects the claims of the State:

The claims of the State, as presented in the petition, in general and in detail, are controverted by the company.

It DENIES, as respects the road in question,

THAT ITS RIGHT TO BUILD AND TO USE THE SAME WERE DERIVED FROM THE *State*.

It AFFIRMS that they were derived from *Congress*, with the assent of the *State*, either

(A) BECAUSE CONGRESS CREATED IT OR ITS MEMBERS A CORPORATION FOR THE PURPOSES SPECIFIED IN THE PACIFIC RAILROAD ACTS,

OR

(B) BECAUSE CONGRESS DIRECTLY CONFERRED UPON THE TERRITORIAL

CORPORATION, WHOSE NAME IT AFTERWARDS CHANGED TO THE KANSAS PACIFIC, THE NECESSARY AUTHORITY TO BUILD AND OPERATE THE ROAD, AND AIDED IT BY SUBSIDIES, WHICH AUTHORITY AND SUBSIDIES WERE GRANTED FOR NATIONAL OBJECTS ON TERMS AND CONDITIONS BINDING ALIKE UPON THE COMPANY AND THE STATE, WHICH ARE WHOLLY INCONSISTENT WITH PRESENT PRETENSIONS OF THE STATE.

Circumstances surrounding the passage of the Pacific Railroad Act of July 1st, 1862.

The country was in the midst of a civil war. Our Pacific possessions were supposed to be in the peril which might at any time arise from foreign complications. The expense of transporting troops, munitions of war, supplies, and mails to the Pacific Coast and to the intervening Territories, was enormous. For many years the project of a railroad to the Pacific Ocean had been a favorite one with statesmen of eminence in Congress. In 1862, all parties, without reference to their previous tenets in regard to internal improvements by the General Government, united in favor of the policy of the National Government aiding to build a railroad to the Pacific. Private capital, unaided by Congress, could not be enlisted in an undertaking so hazardous and so expensive.

In 1860 both of the great political parties declared

the construction of such a work to be a *public necessity.*

The *National Republican Convention* of that year

"RESOLVED, that a railroad to the Pacific is imperatively demanded, and the Federal Government ought to render immediate and effective aid in its construction."

The *National Democratic Convention*

"RESOLVED, that one of the necessities of the age, in a military, commercial, and postal point of view, is a speedy communication between the Atlantic and Pacific States, and the Democratic party pledge such constitutional government aid as will secure the construction of a railroad to the Pacific Coast at the earliest practicable period."

The work as contemplated by the Act of July 1, 1862, was not, in any sense, *private;* but was, in every sense, *national.* It was not the enterprise of the corporators or of the local companies; but one promoted by the Government for national and public ends.

THE NATIONAL CHARACTER AND PURPOSES of this work and the circumstances under which it was undertaken by Congress are well set forth in the opinion of the Supreme Court of the United States in the case of the *United States vs. The Union Pacific Railroad Company,* 91 U. S., 72. Mr. Justice DAVIS, delivering the judgment of the Court, said:

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But Courts, in construing a statute, may with propriety recur to

the history of the times when it was passed: and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it (Aldridge vs. Williams, 3 How., 24; Preston vs. Bowder, 1 Wheat., 120).

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed.

"The war of the rebellion was in progress, and, owing to the complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the Government itself with the direct execution of the enterprise.

"*This enterprise was viewed as a national undertaking for national purposes;* and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory

lying between the Missouri and Sacramento rivers, which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United Status largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered unsurmountable.

"Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians, jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. *The project of building the road was not conceived for private ends;* and the *prevalent opinion was, that it could not be worked out by private capital alone.* IT WAS A NATIONAL WORK, *originating in* NATIONAL *necesssities and requiring* NATIONAL ASSISTANCE. The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation

of *a work deemed essential to the security of great public interests.*

It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. *But the primary object of the government was to advance its own interests, and it endeavored to engage individual coöperation as a means to an end, the securing a road which could be used for its own purposes.* The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history."

Not only was this great work *national* in its character and purposes, but Congress, to use the words of Chief Justice MARSHALL, in holding valid the Act of Congress establishing the Bank of the United States, could not have created a corporation, or bestowed powers upon a corporation, "*for its own sake or for private* purposes," *or for any other "than national and public purposes;*" and the bank was considered to be national in its character, although managed by "private individuals for private trade and private profit."

As the purpose of the Pacific Railroad Acts were national, the means employed to secure these purposes were also national, and under the jurisdiction and power of the National Government, and not dependent upon the will, pleasure, caprice or hostile interference of the States in which the road was to be constructed, maintained and operated.

The State's view, on the other hand, is that the road in question ever has been and is nothing but a *local road of the State*, from which it derived all its powers, and which holds its control, regulation and destiny in its hands, unaffected by anything which it has done, or consented to, or which Congress has enacted or the company has done, with the consent of the State, or under the enactments of Congress. The purpose of this Argument will be to show that the view of the State is not tenable.

We will better understand what Congress and the State intended in what they did, if we look at the circumstances under which they acted.

Political condition of the country in 1862, in which the Pacific Road and Branches were required to be built.

KANSAS and NEBRASKA had been organized as Territories in 1854.

10 Stats. at Large, 277.

The western boundary of the Territory at Kansas was "the eastern boundary of the Territory of Utah on the summit of the Rocky Mountains."

(Section 19.)

Kansas was admitted as a State of the Union January 29, 1861, with the present boundaries.

12 Stats. at Large, 126.

On the 5th day of February, 1862, Mr. ROLLINS introduced into the United States House of Representatives a bill for the construction of a railroad

from the Missouri River to the Pacific Ocean, recited in the Joint Resolution of the State of Kansas, of March 4, 1862.

Printed in Exhibit L. to answer, p. 18.

This Joint Resolution of Kansas asked Congress to *ratify the treaty* lately concluded between the *United States and the Pottawatomie* Indians as being indispensable to the construction of said railroad.

THIS TREATY will be found in 12 Stats. at Large, p. 1191; and was finally ratified and proclaimed, April 19th, 1862. It recites (Article 5).

"The Pottawatomies believing that the construction of the Leavenworth, Pawnee and Western railroad *from Leavenworth* to the former reserve of the Delawares is now rendered reasonably certain, and being desirous to have said railroad extended through their reserve, in the direction of Fort Riley, so that the value of the lands retained by them may be enhanced," agree to sell the whole of their surplus lands to the company at $1.25 per acre.

"The Treaty states that if said company shall make such purchase it shall be subject to the following considerations: they shall construct and fully equip a good and efficient railroad *from Leavenworth City* to a point half way between the western boundary of the said former Delaware reserve and the western boundary of the said Pottawatomie reserve, within six years from the date of such purchase, &c., &c."

THE TERRITORY OF COLORADO was organized with substantially its present boundaries by the act of February 28, 1861, and included a large portion of what had previously been Kansas.

(12 Stats. at Large, p. 172).

THE TERRITORY OF NEVADA was organized March 2, 1861.

(12 Stats. at Large, 209).

An act to enable the people of Nevada to form a State Constitution and State government and for its admission as a state was passed March 21, 1864.

(13 Stats. at Large, 30).

It was admitted into the Union as a state by proclamation of the President, October 21, 1864.

(13 Stats. at Large, 749).

Condition of the Iowa and Missouri Railroads in 1862.

In 1862, the Dubuque and Sioux City Railroad had a road in Iowa partly finished, looking to Sioux City, in Iowa, as its western terminus. A railroad in Iowa from Lyons or Clinton, on the Mississippi, was completed a short distance into the State looking toward Council Bluffs. Another railroad from Davenport, Iowa, on the Mississippi was completed as far west as Iowa City. The Burlington and Missouri River Railroad Company of Iowa had a road partly completed looking to a western terminus on the Missouri River near Platsmouth, Nebraska. The Hannibal and St. Joseph Railroad of Missouri was completed from Hannibal on the Mississippi to St. Joseph on the Missouri River. The Missouri Pacific, commencing at St. Louis, was completed to the City of Jefferson, and perhaps a short distance west of that place, its western charter terminus being at or near Kansas City, Missouri.

In view of these facts, THE PLAN AND SCHEME of the Pacific Act of 1862 is plain.

CONGRESS IN THE PACIFIC RAILROAD LEGISLATION MADE THE AIDED AND SUBSIDIZED ROADS A CONNECTED SYSTEM.

Any conception of the plan of Congress will be erroneous which does not embrace the fundamental idea that it was its intention in the Pacific Railroad legislation to make the *main line* and the specified *branches* component part of a continuous line and connected system.

As Congress needed the trunk lines and branches for the same purposes and extended to all the same aid, it made no distinction between the "main line" and the "branches" in their power, duties and obligations. The trunk line and branches were regarded as mutually dependent upon each other for their usefulness and value. The branches were necessary to connect the trunk line with the railroad system of the Northern, Middle and Eastern States; and without such connection the usefulness and value of the trunk line would be seriously impaired.

To this end every "*branch*" was specifically required to "*connect and unite*" with "*the main trunk*" or with one of the other *branches* having a connection with the main line. There was no hiatus allowed. The "branches" were put upon the same footing in all respects as the "main line." They were to be built "*upon the same terms and conditions in all respects* as are provided in this act," for the Union Pacfic Company. The main line and branches together constituted a

system—a continuous connected system—a unit in its purpose and operation. As the plan was framed in the Act of 1862, not one inch of the road of either main line or branches to be constructed under the act was left without a subsidy of both bonds and lands.

Various provisions were made to secure the construction of the main line and each branch, such as that each company shall construct its portion within a given time, and construct it so as to "connect and unite" with the rest of the system.

And so essential was *each* branch considered to the whole system, that under the Act of 1862 (Sec. 17), Congress provided for a forfeiture of *all* if any one company failed to construct its own part.

Other provisions show the essential *unity* of the main line *and branches* as far as Congress could effectuate it without consolidation by the voluntary action of the companies concerned, which as we shall hereafter see, it fully authorized them to take.

"THE TRACK upon the *entire line of railroad and branches* shall be of UNIFORM WIDTH, to be determined by the President of the United States, so that when completed cars can be run from the Missouri River to the Pacific Coast." Sec. 12, Act 1862.

The whole line of said railroad branches and telegraph "shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, *one continuous line.*" § 15 Act, 1864; Act June 20, 1874. "In such operation and use to afford and secure to *each equal advantages and facilites as to rates, time and transportation, without any discrimination* of any kind in favor of the road or business of any or either of said companies or adverse to

the road or business of any or either of the others." *Ib.* That if said roads are not completed so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento River in California by the first day of July, 1876, *the whole of* ALL SAID RAILROAD, before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements and hereditaments and property of every kind and character shall be FORFEITED TO, *and be taken possession of, by United States.* Sec. 17, Act 1862.

"THAT THE GAUGE of THE PACIFIC RAILROAD AND ITS BRANCHES *throughout their whole extent from the Pacific Coast of the Missouri River* shall be and hereby is established at four feet eight and one-half inches." Special Act of Congress of March 3, 1863.

Every *power* here granted is one which *only the Sovereign* can grant. Every *duty* here imposed is one which *only the Sovereign* can require. This Sovereign was Congress and not the States of Kansas or California, or the new States (Nevada, Nebraska and Colorado) since erected in territories traversed by the Pacific System of roads.

The purpose was, as shown by the title and body of the Act of 1862, to secure by means of "the main trunk line" (Sec. 8) and the Central Pacific of California (Sec. 9) and the Sioux City branch (Sec. 14), the Iowa branch (Sec. 14), the St. Joseph branch (Sec. 10) and the Kansas branch (Secs. 9, 10), all of which were required to be completed at a specified rate and within a specified time, a continuous connected line of railroad, ready for use, from the Missouri river to the Pacific ocean by the first day of July, 1876.

See title to Act July 1, 1862; Sec. 17 of Act July 1, 1862.

The object of the grants and subsidies of the United States to the railroad companies named was "to secure to the government the *use* of the same for postal, military and other purposes."

SCHEME OF THE PACIFIC RAILROAD ACTS.

To effectuate these national ends Congress created the *Union Pacific R. R. Co.* with authority to build a *main trunk or line* commencing at a point on the one hundredth meridian in Nebraska, to be fixed by the President of the United States, and running westerly through the Territories of the United States to the western boundary of the Territory of Nevada, there to "meet and connect" with the line of the Central Pacific of California. Sec. 8, Act 1862.

The *Central Pacific* (Sec. 9) of California was authorized to construct a railroad from the Pacific coast to the Eastern boundary of California and there "to meet and connect" with the Union Pacific.

The Union Pacific (Sec. 14) was required to build the *Iowa branch* to the western boundary of Iowa (fixed afterwards by the President at Council Bluffs), and the Sioux City branch.

The H. & St. Joe (of Mo., Sec. 13), was authorized to build the branch *via* Atchison (some miles below St. Joseph), which afterwards became and is the road called the Central Branch, Union Pacific, subsidized for only 100 miles next to the Missouri river *"to connect and unite" with the road through Kansas;* or the H. & St. Joseph Company might, with the consent of Kansas, construct the road west

from St. Joseph so as to connect and unite with the Iowa branch east of the one hundredth meridian, or with "the main trunk road" at the one hundredth meridian.

KANSAS BRANCH. As this controversy concerns the KANSAS BRANCH, "or the road through Kansas," we now turn our attention to the legislation relating to it.

On March 4, 1862, Kansas had passed "an Act relating to Railroad Companies," which was specifically intended to embrace the Leav., Pawnee & Western Company, authorizing "*consolidation* with any company or companies now organized or hereafter to be organized under the *laws of the United States.*"

Compiled Laws of Kansas of 1862, p. 767; reprinted in Exhibit to Answer, p. 13.

This act was doubtless passed in view of the Rollins bill which was then pending in Congress.

On the same day the Legislature passed the joint resolution requesting Congress to pass the Rollins bill, which gave express power to consolidate.

See Joint Resolution in Exhibit to Answer, p. 18.

Extract from Rollins bill, Ib. pp. 19, 20.

EWING'S LETTER refers to Rollins' bill "as having been published by order of the lower branch of the Kansas Legislature, and as having been examined and discussed with care, before the concurrent resolution was adopted."

Exhibit to Answer, p. 26.

By the joint resolution, Congress is requested by the State of Kansas to pass the very Act which afterwards became the Act of Congress of July 1, 1862. The State gave its assent thereto in advance. By the above-mentioned Act of March 4, 1862, it anticipated the passage of such an Act by Congress, and gave in advance a continuing power to "*any* railroad company of Kansas, then or thereafter to be organized," *specially including the Leavenworth, Pawnee & Western Railroad Company*, to unite or consolidate with any other State or federal railroad corporation, then or thereafter to be organized. Congress acted with full knowledge of this legislation, and upon the faith of it, so far as the State of Kansas and the Leavenworth, Pawnee & Western Railroad Company are concerned.

This action on the part of the State constitutes an *irrevocable consent* that Congress might, as it did, empower the State corporation adopted by it, to consolidate with the other roads of the Pacific system.

Sections 9, 10 and 13 of the Act of July 1, 1862, are the only ones specially relating to the Kansas branch.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one-hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the

same at the meridian of longitude aforesaid, and in case the general route or line of road from the Missouri river to the Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point, on the one-hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make *connection within the limits prescribed in this act*, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one-hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company *may proceed to build* said railroad to the aforesaid point, on the one-hundredth meridian of longitude west from Greenwich, *in the Territory of Nebraska*. The Central Pacific Railroad Company, of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

SEC. 10. *And be it further enacted*, That the said company chartered by the State of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the

whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads, respectively, said companies, or either of them, may unite upon equal terms with the first named company in constructing so much of said railroad and telegraph line, and branch railroads and telegraph lines in this act hereafter mentioned, through the Territories from the State of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal & St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first named company, or either of them, on filing their assent to this act, as aforesaid, may unite upon equal terms, under this act, with the said Kansas company, in constructing said railroad and telegraph to said meridian of longitude, with the consent of the said State of Kansas; and in case said first named company shall complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States* to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads

*See section 6, act July 2, 1864. The words "and States intervening" inserted.

shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 13. *And be it further enacted*, That the Hannibal & Saint Joseph Railroad Company, of Missouri, may extend its roads from Saint Joseph, *via* Atchison, to *connect and unite with the road through Kansas*, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose use any railroad charter which has been or may be granted by the Legislature of Kansas: *Provided*, That if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas Legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one-hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. *And the Leavenworth, Pawnee & Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.*

Congress fixed the termini, general course and place of connection of the main line and of each branch. It designated the charter line of the Kansas company, as will be now shown in detail. The Territorial charter line of the road of the Kansas Company and the route of the road built in Kansas under the authority of Congress are entirely different.

The road of the Kansas Pacific Company was BUILT UPON THE ROUTE REQUIRED BY CONGRESS, AND

NOT UPON THE ROUTE AUTHORIZED BY THE TERRITORIAL CHARTER.

The petition of the Attorney-General makes, on this subject, the following allegations:

"That the said Leavenworth, Pawnee & Western Railroad Company, under its various changes of name, as hereinbefore set forth, constructed a railroad from *Leavenworth* by the way of the Fort Riley military reservation, towards the summit of the Rocky Mountains, in compliance with its said charter, and a railroad from a point at or near Wyandotte, at the junction of the Missouri and Kansas rivers, to a connection with said *main road* at or near the City of Lawrence, in the State of Kansas, and thereupon continuously operated and controlled said railroad, and enjoyed the liberties, privileges and franchises thereof, up to the 24th day of January, 1880, *under and by virtue of the said charter of* 1855, and the supplementary act amending the same as hereinbefore recited. That on the 24th day of January, 1880, the said Kansas Pacific Railway Company wrongfully and unlawfully attempted to consolidate its said corporation with the Union Pacific Railroad Company, a corporation chartered under the said Acts of Congress of 1862 and 1864."

These allegations are specifically denied by the answer.

Answer, paragraph VIII., page 22.

See also averments in the anwer as to the eastern terminus of the road in the State of Missouri.

Answer, p. 25.

The answer also states:

"That the Kansas Pacific Railway Company thus incorporated and existing by said Act of Congress and said amendatory acts, proceeded to build and did build its line of road on the route marked out by said Acts of Congress and not otherwise or elsewhere, and under the franchises, rights and powers granted

and conferred by said Acts of Congress, and in the manner and under the terms prescribed by said acts and not otherwise. *That the route thus selected and authorized by Congress was not the one mentioned and described in the charter of the Leavenworth, Pawnee & Western Railroad Company*, nor was the railroad built by the Kansas Pacific Railway Company in any way ever constructed, managed or operated under said last mentioned charter, or any charter or legislation of the Territory or State of Kansas."

The charter route of the Leavenworth, Pawnee & Western Company was "to construct a railroad from the west bank of the Missouri river, *in the Town of Leavenworth*, in this Territory; and from thence west to the Town of Pawnee, or to some point feasible, and near the Government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the Territory."

Charter of 1855, section 7, printed in Appendix to Answer, p. 5.

The amendment of 1857, section 1, authorized a *southern* branch, "beginning at some favorable point" on the above-described line.

It also authorized, (section 3,) "branches of said road from any point *on the said road*, to any point on the southern or western boundary of the Territory of Kansas," also "a branch from *any point on the said road* (*i. e.*, the road described in charter of 1855) to any point on the northern boundary of the Territory."

Amended Act of 1857, printed in Appendix to Answer, p. 11.

No authority was given by this charter to start the main line of this road anywhere except "*in the*

Town of Leavenworth," and no authority was given to build even a branch to Wyandotte, or to the mouth of the Kansas river, or to the *eastern* boundary of Kansas.

The road which *Congress* authorized was "from the Missouri river, at the mouth of the Kansas river on the *south* side thereof, *so as to connect with the Pacific Railroad* of Missouri, to the aforesaid point on the 100th meridian."

This point is not, and never was, within the limits of *Leavenworth* County. The southern boundary of Leavenworth County (see Exhibits F and G to Answer) in both exhibits is down the channel of the Kansas River, and all the land *south* of the Kansas River, including the point where the defendant commenced the construction of its road under the Act of Congress, is in *Johnson* County. The terminus fixed by Congress is therefore at a point not authorized, expressly or by implication, by the Territorial Charter. The line from Lawrence to Kansas City is not a *branch* line under the Territorial Charter, for that gave no power to build a branch to the *east* line of the State. Besides, the Act of Congress calls that the *main stem* or line, and the road from Leavenworth to Lawrence a *branch.*

This eastern terminus was fixed by Congress with a full knowledge that it would or might require the said road to be built as it was built, nearly a mile into the State of Missouri.

Debates in Congress, pp.

The eastern terminus thus fixed is more than twenty miles from the Town of Leavenworth named n the Pawnee charter.

"Said Kansas company may proceed to build said railroad to the aforesaid point on the 100th meridian, *in the Territory of Nebraska.*"

The western or northern terminus in *Nebraska* was many miles beyond the limits of the State of Kansas.

The road which Congress *authorized*, and if its grant was accepted, *required* to be constructed from the Pacific Railroad of Missouri to the 100th meridian in Nebraska, is neither identical nor coincident with the road authorized by the Pawnee charter. On the contrary, the general direction was different.

On July 1, 1865, the company filed in the Department of the Interior a map of the general route of its road, from the eastern terminus to the 100th meridian.

By this act it elected to make the required "connection" with "the main line" at the point on the 100th meridian.

On July 3, 1866, Congress passed an act enabling the defendant company (14 Stat., 79) "to designate the general route of their road, and to file a map thereof, as now required by law, at any time before December 1, 1876," &c.

Printed at Large in French Rep. for 1879, at p. 125.

After this act the company changed its above mentioned route, *via* the Republican River to the 100th meridian, and adopted what is known as the route by the Smoky Hill river, which lies wholly in Kansas, which route ran westwardly through Kansas and into Colorado to Denver.

"The road was completed to Sheridan," says the

United States Supreme Court, "405 miles from the Missouri State line (the point of commencement) on the 2d day of November, 1869. The authority to extend its road west of the 100th meridian was derived from the 9th section of the Act of 1864," which the Court quotes.

United States vs. Kansas Pacific Ry., 99 U. S., 458, 1878.

This authority to make this change of route was certainly given by the above-mentioned Act of July 3, 1866, sanctioned by the Act of March 3, 1869, next referred to.

On the 3d day of March, 1869 (15 Stats., 324), the important act in relation to making the connection with the Union Pacific, from Denver to Cheyenne, was passed.

Printed in French's Report for 1879, at p. 128. And in Appendix to Answer, p. 55.

The road was actually completed to Denver, August 15, 1870, 245 miles beyond the 100th meridian, and to Cheyenne, September 1, 1870; and was finally accepted by the President October 15, 1872.

U. S. vs. Kansas Pacific Co., *supra.*

This review demonstrates that the original location *via* the Republican was under the Act of Congress; and the change to the Smoky river route was one authorized by Congress by the legislation of July 3, 1866, sanctioned by the Act of March 3d, 1869.

Senator HARLAN'S views, Nichol's Compilations, p. 13.

The Kansas Legislature, in 1868, asked Congress to make the connection of the Kansas Pacific with the Union Pacific "*by the way of Denver City.*"

Exhibit P to Answer, p. 22.

Congress complied with this request of the State by the Act of March 3, 1869. Section 2 enacted that the defendant company "*shall* extend its railroad to a connection at the City of Denver."

Act March 3, 1869. Exhibit D to Answer, p. 55.

THIS ACTION OF CONGRESS fixing the terminal points and route of the Kansas Branch and requiring it to be constructed beyond the jurisdiction of Kansas, is action which only the *Sovereign* can take and confers powers which only the *Sovereign* can grant.

In March 1864 the *state of Kansas passed a* JOINT LEGISLATURE RESOLUTION asking congress *to make Lawrence, Topeka* and other towns points on the Kansas branch.

See text of this joint resolution, Appendix to answer, pp. 20, 21.

Its own want of power in respect of the location of the road and the *sovereign* power of Congress in this regard, and the assent of the State to the exercise of that power by Congress are decisively shown by this Joint Resolution.

Having shown that each terminus and the general route of the road which Congress authorized and required to be built, are different from the termini and route authorized by the Territorial charter, it is

pertinent to pause here and inquire, of the learned Attorney-General of the State and his associate counsel, what is their position in respect of the authority conferred by Congress upon the Kansas company. Is it valid or void? was any thing added to the powers of the Kansas company by the Acts of Congress?

Was the road which was built where congress required, built without authority? If not, under what authority was it built? Was it exclusively under State authority? or exclusively under the authority of Congress? or under their united authority?

Was the State's assent to the termini and of route of the road required by Congress to be built necessary? If so it was it not given?

We maintain that by the legislative Acts and acquiescence of the State, it has assented to the Pacific Railroad Acts of Congress; assented to the Leav. Pawnee & Western Company consenting thereto, and has thereby waived any right, if it otherwise had it, to insist on forfeitures which are inconsistent with the powers given to, and duties required of, the company by said Acts.

The legislative Acts and joint resolutions of the State of Kansas show an *express request* to pass the Pacific acts and *an express assent* to them on the part of the State. The acquiescence and implied assent of the State are equally binding upon it. The Supreme Court has held that a State may *impliedly* assent to the legislation of Congress.

United States vs. Gallatin, 99 U. S., 700.
Wilson vs. McNamee, 102 U. S., 572, 575.

STATUS OF THE KANSAS PACIFIC ROAD IN COLORADO.

When the Pacific Acts were passed the Territory of Colorado had been organized and the Kansas branch for 245 miles was afterwards built in that Territory without any charter or authority from its legislative assembly.

What is the position of the State's Attorneys as to the status of the road in Colorado?

Was it built without authority?

Congress by the Act of July 2, 1864, (sec. 12) July 3, 1866 and March 3, 1869, clearly authorized it to be built there, and it was built there under the authority of Congress, and under no other authority. But the authority under which the Kansas part was built, was precisely the same as that under which the Colorado part was built.

Is it the State's position that it is as to the part in Kansas a *State* road, and as to the part in Colorado a *Congressional* road?

We maintain that the road has a *uniform legal status and character in both jurisdictions.*

Local considerations had no place in the minds of Congress, and did not influence its action. It is wholly inadmissible to suppose, that Congress intended the Kansas Branch to have two sets of powers, one in Kansas and one in Nebraska or Colorado. *Congress adopted the Kansas Company into the Pacific family* (with the assent of the State) and placed it upon the same national basis "in all respects," that it did the Union Pacific and the other members of the Pacific family, as to all the road which it should construct under the Act of Congress.

The Supreme Court of Kansas has expressly rec-

ognized the Kansas Pacific road as part of the Union Pacific system (see Grinter vs. The Kansas Pacific Railway Co., 23 Kansas, 642). The syllabus of the case, which is prepared by the Judge who writes the opinion, refers to the Leavenworth, Pawnee & Western Railroad Company, the history of the legislation of Congress and the opinion of Mr. Justice DAVIS, above referred to, declaring this to be a *national* undertaking for *national* purposes, and says, "that by the Act of July 1st, 1862, the Leavenworth, Pawnee & Western Company became an associated enterprise of the Union Pacific Railroad Company, *and was incorporated into the system*, and the United States assumed the obligation to give it the right of way through the Delaware Reservation."

On this point the case of the St. Joe and Denver City Railroad vs. Baldwin, 103 U. S., 430, is instructive, and shortly stated, was this:

Congress, July 23, 1866 (14 Stats., 212), granted the St. Joe and Denver City R. R. Co., of Kansas lands and the right of way through the public lands for a railroad from "Ellwood in Kansas, westardly *via.* Marysville in the same State so as to effect a junction with the Union Pacific in Nebraska," then a Territory.

Before the road was built in Nebraska it had become a State. The Nebraska Legislature annexed conditions to *non-resident* companies extending and building their roads in the State, such as filing articles with the Secretary of State, recording them in the counties, keeping an office in the State, in some county in which its road is &c. State Act, February 12, 1869. Brown's Laws Neb., 1873, p. 203.

It seems that the St. Joe and Denver City Co. did not comply with these conditions. The effect of such non-compliance is discussed in R. R. Co. vs. Baldwin 103 U. S., 430, 431, and in Van Wyck vs. Knevals, 106 U. S., 369.

"The grant of land and the right of way for the construction of a road to a designated point was sufficient authority for the company to construct the road to that point. It may be well doubted whether the State subsequently created out of the Territory could put any impediment upon the enjoyment of the right thus conferred."

"It could do so only on the same terms it could refuse a recognition of its own previously granted right, for on such matters the State would succeed only to the authority of Congress over the Territory."

Recurring now to the scheme of the Pacific Acts and the relation of the Kansas branch to the rest of the system, the Court will find that Sec. 10 of the Act of 1862 is extremely important as showing not only the unity of the Pacific system of roads but the powers which Congress, without requiring any consent from the States of California or Kansas, gave to the Central Pacific and Kansas Pacific Companies.

Said Section 10 quoted, *supra*, at p.

KANSAS PACIFIC BUILT UNDER FEDERAL AUTHORITY.

I now proceed further to show that the KANSAS BRANCH was built on the route fixed by Congress, and under the authority of Congress, and on no other route and under no other authority.

Section 10 of the Act of 1862 authorized the Central Pacific and the Kansas Pacific to unite with the

Union Pacific on equal terms, in constructing any part of the main line and all or any part of unfinished branch lines.

It authorized the Central Pacific to unite with the Union Pacific to build the Kansas branch.

It authorized the Kansas Pacific and Union Pacific to unite in building the main line or any of the branches.

It authorized the Central Pacific in the contingency specified to build the main line and the Kansas branch and all without the assent of the State. Is all this void?

Could the Central Pacific have been stopped by the State of Kansas?

Are the rights of the United States in the Kansas Pacific any less than they would have been if it had been built bythe Central Pacific or by the union of the Central Pacific and the Union Pacific?

Are they any less than they are at present in the State of Nebraska in respect of the Union Pacific line?

In the Act of July 2, 1864 (Sec. 12), certain changes in the Act of 1862 were made. Congress, by the words "*shall build*," &c., made it obligatory on the company to "build the railroad from the mouth of the Kansas river by way of Leavenworth, or within two years to build a railroad from the City of Leavenworth to unite with the main stem, &c.

See section 12, Act 1864, printed *supra*, p.

Under the 13th section, Act July 1, 1862, this branch not being required and not being subsidized, was no part of the Pacific system. But in 1864 being required to be built and subsidized by lands and called a branch, it was adopted into the Pacific family.

Was this addition to the powers and duties of the company valid or void?

It was further provided (Sec. 12, Act of 1864,) that if when the Kansas Pacific reached the 100 meridian the Union Pacific was not then proceeding in good faith to build the road through the Territories, the Kansas Pacific might build the road westward until it should meet and connect with the Central Pacific.

Was this addition to the powers of the company valid or void?

Responsive to the above mentioned joint resolution of the Kansas Legislature of March, 1864, (printed in Appendix to Answer at p. 20), Congress, by the use of the word "*shall*" in the 12th section of the Act of 1864, made it obligatory on the company to build *via* Lawrence and Topeka.

Why did not Kansas say then as she says now: "You are our child and owe obedience to us and if you don't go to Lawrence and Topeka we will forfeit your charter."

All this shows plainly enough that Congress did not simply bestow bounties and largesses upon a State corporation for its own benefit or that of the State, but was effectuating a great national object by an uniform system. This, however, does not exhaust the argument.

Take the words of the grant of power to build:

To the Union Pacific Company which it created the words are (§ 1, Act 1862), "said corporation is *hereby* authorized and empowered to lay out, locate, construct, &c., a continuous railroad," &c.

So in respect of the Kansas branch, the words are the same: "That the Leavenworth, Pawnee and Western Railroad of Kansas are *hereby authorized* to construct a railroad from," &c., and later on, in the same section as well as in the 12th section of Act 1864, Congress uses mandatory language as to its location.

Congress *authorized* the Kansas Company to build the Kansas branch, but when the company accepted the act, it was then *obliged* to build on the route and conditions prescribed by Congress.

This is inconsistent with the claim of the State in the present suit that the road was built under and in conformity with the Territorial charter.

The assent of the company to the Act of Congress had been ratified by every one of subsequent acts and resolutions of the Legislature of Kansas relating to this road. The State has therefore, consented, if its consent be necessary, that the company shall perform all of its federal duties, and has waived or renounced any right to defeat such performance, by enforcing conditions inconsistent therewith.

But the argument is not exhausted. *What the Legislature strikes out of a bill often shows the legislative will as plainly as what is finally expressed.*

The Pacific bill of 1862 as originally reported to Congress read:

"Sec. 9. That the Leavenworth, Pawnee and Western Railroad Company of Kansas, are hereby authorized to construct a railroad and telegraph line, *in conformity with their charter from said State*, from the Missouri river," &c.

Congress struck out the words "in conformity with their charter from said State."

Debates, p. 73.
" p. 112.
" p. 125.
" p. 131.

Renewed in Bill for Act of 1864, Sec. 13, printed in Debates p. 207 and again struck out by Congress.

But the argument is not exhausted. *The Pacific Acts distinguish between the portions of the roads of the companies named therein*, CONSTRUCTED UNDER THE PROVISIONS OF THE ACTS OF CONGRESS AND OTHER PORTIONS.

Thus, in Sec. 12, Act 1862, as to transporting materials.

So in Sec. 17, Act 1862, the forfeiture to the United States for non-completion in the required time "is the whole of the railroads before mentioned and to be *constructed under the provisions of this Act.*"

So in Sec. 11 of the Act of 1864, it is expressly declared that no subsidy of lands or bonds shall be given on account of road built prior or subsequent to July 1, 1862, "*under the provisions of any Act or Acts* OTHER THAN THIS ACT [July 2, 1864], AND THE ACT AMENDED BY THIS ACT" [July 1, 1862].

Language more decisively and clearly expressing that Congress understood that the roads that received the subsidies *were built under the Acts* of July 1, 1862 and July 2, 1864, could not have been used.

But the argument is not exhausted.

Congress was providing for a great national transcontinental highway for national purposes, and as to powers, subsidies and duties, placed the main line and branches upon the same footing "in all respects," and made them integral parts of a comprehensive system.

The road from the one hundredth meridian west it calls "the main trunk road" (Sec. 13, Act 1862); "the main line" (Sec. 14, Act 1862); "the main stem" (Sec. 12, Act 1864); "the main trunk line west of the one-hundredth meridian" (Sec. 12, Act 1864).

The roads from the one-hundredth meridian to the Missouri, as, for example, to Sioux City, Omaha, St. Joseph, the mouth of the Kansas river, it designates "*as branches.*"

Illustrations.

ACT OF 1862, Sec. 12. "The track upon the entire line of railroad *and branches* shall be of uniform width, etc., etc.; the *whole line* of said *railroad and branches* shall be operated and used as one *connected, continuous* line."

Sec. 15. "That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road *and branches* provided for in this Act."

Sec. 17. "In case said company or companies shall fail to comply with the terms and conditions

of this Act, by not completing said road and telegraph and *branches* within a reasonable time."

ACT OF 1864, Sec. 12. "That the Leavenworth, Pawnee and Western Railroad Company shall build a railroad from the mouth of the Kansas River, by the way of Leavenworth, etc., etc., to unite with the *main stem* at or near the city of Lawrence."

Sec. 17. "That so much of section 14 of said Act as relates to a *branch from Sioux City* be and the same is hereby amended." "The *Iowa branch* of the Union Pacific Railroad from Omaha." "The Union Pacific Railroad shall be and is hereby released from the construction of said *branch*."

Sec. 18. "The Burlington and Missouri River Railroad Company is authorized to construct a road to *unite with the main trunk* of the Union Pacific Railroad, etc." Act of June 20, 1874.

"In case of the refusal of the said Union Pacific Railroad Company, or *either of said branches*."

The joint resolution of the State of Kansas of February 18, 1874 (Exhibit to the answer, p. 23) repeatedly refers to the *Kansas Pacific* as "*one of the branches*" contemplated by the original Act of Congress of 1872, and the subsequent amendments.

The expression "main line and branches," so often repeated, unmistakably marks and demonstrates the contemporaneous understanding of Congress.

But the State of Kansas now insists that Congress was mistaken in supposing this road to be part of the Pacific system, and claims that this road is, and always has been, a Kansas road and that the power of the State over it is not abridged or affected by the Acts of Congress.

But the argument against this view is not exhausted. *The powers declared or reserved to Congress in respect of the* BRANCHES *are wholly inconsistent with the present pretension of the State, that the roads in Kansas, built under the Acts of Con-*

gress and by means of its subsidies, are as entirely subject to the legislative power and visitation of the State as if the Acts of Congress had not been passed and their benefits accepted and received.

Let us here consider the expressed POWER OF CONGRESS AS TO THE BRANCHES.

We have already shown (*ante*, p), that to insure the completion of the whole Pacific system, main line and branches, Congress (in Sec. 10 of the Act of 1862; Sec. 12, Act 1864; Sec. 2, Act July 3, 1866) provided that different companies named in the Acts might unite, or if any given company failed to build its line, one or more of the other companies might build it and succeed to its rights.

Throughout the Acts, Congress assumed the same power over the *branches* as it did over the *main line*.

Thus, Congress itself fixed, as already shown, (*ante*, p) the EASTERN TERMINUS AND THE LOCATION of the route of the Kansas branch.

It also required "the entire line of railroad and *branches* to be of UNIFORM WIDTH and to be operated and used as *one* connected continuous line."

Sec. 15, Act 1862.

And enforced this duty by *penal sanctions*.

Act June 20, 1874.

Congress gave "any other railroad company the RIGHT TO CONNECT their road with the road and *branches* provided for by this Act."

Sec. 15, Act 1862.

The original provision gave to other roads the right to connect with the main line only; Congress

amended the provision so as expressly to include "*branches.*"

Debates, p. 128.

Congress authorized the *branch* lines as well as the others TO CONSOLIDATE.

Sec. 16, Act 1862.
Sec. 16, Act 1864.

Every one of the foregoing grants and requirements implies SOVEREIGNTY *over the whole system, both main line and branches, in Congress.*

Congress (Sec. 17, Act 1862) in case "said company or companies [whether main line or branch], failed to comply with the terms and conditions of this Act, either by not completing in time, or by not keeping in repair and *use*" reserved the right "to pass any act to insure the speedy completion of said road and *branches*;" and in case of a failure to have "said roads completed, so as to form a continuous line of railroad ready for use from the Missouri to the Sacramento river by July 1, 1876, the whole of *all* of said railroad [including *branches*] before mentioned and to be constructed under the provisions of this Act shal BE FORFEITED *to and taken possession of by the* UNITED STATES."

Sec. 17, Act 1862.

How can this supreme, *sovereign* right of visitation and forfeiture in the *United States*, extending not only to the company's failure to build, but to a failure to keep in repair and *use*, be reconciled with a right in the STATE OF KANSAS to forfeit the company's franchises, including its corporate life and its right to *use* its road?

But the most striking, because it is the most decisive *criterion of sovereignty* over the companies named in the Act, including the Kansas company, is to be found in the reservation of power to Congress, "at any time—having due regard for the rights of said *companies* named herein—to ADD TO, ALTER, AMEND, OR REPEAL THIS ACT."

Sec. 18, Act 1862.

This continuing power of change and destruction, under the restrictions which accompany it, is declared to be reserved to Congress, "the better to accomplish the object of this act, viz.: to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times [*i. e.*, if Kansas shall graciously spare it from forfeiture], but particularly in time of war, the use and benefits of the same for postal, military, and other purposes."

The military, postal and telegraphic duties assumed by the companies as the conditions of their grants from Congress (Sec. 6, Act 1862) are of perpetual obligation, continuing not only until the subsidy debt is paid, but throughout the whole corporate existence.

The duty of the companies (Sec. 6, Act 1862) to apply on the subsidy debt the specified proportion of their net earnings and of their compensation for government service is one which continues "after the said road is completed, and *until* said bonds and interest are paid," that is, it continues, we suppose, if Kansas shall not be pleased to end it by mea n

while dissolving the corporation, and terminating with its life its duties and obligations.

The Act of Congress of June 20, 1874, passed pursuant to the Joint Resolution of the Kansas Legislature (Exhibit Q to answer at pp. 23-25 of Appendix 1), is a strong instance of the exercise of this reserved power to make additions to the original act.

This Joint Resolution of the Legislature of Kansas declares the Kansas Pacific to be "one of the *branches* contemplated in said Acts of Congress," and asks Congress to protect "this branch of the main line."

Kansas has several times appealed to Congress (Exhibits N and Q to answer in Appendix 1) in respect of this road, and each time Congress has granted its request.

When Kansas wants government aid she treats this as a "branch" of the Pacific system, under the control of Congress.

When she wants to strike at the company for exercising rights given it by the Acts of Congress, she treats it as a local Kansas road, and the United States as a "*foreign government.*" See prayer of petition *ante* p. .

But the argument is not exhausted.

The rights expressly secured to the United States, some in perpetuity, and the rest until the subsidy debt is paid, are utterly inconsistent with the existence of any right in the State to forfeit the company's franchises, and to dissolve the corporation.

The Act of July 1, 1862, authorized the Kansas

Company to build the Kansas branch of the Pacific system on "the terms and conditions in all respects" set forth in the act. It required the acceptance thereof by the company within six months, which was given and filed. The Act of Congress thereupon became binding as between the Government and the company. The company could enjoy the grants and receive the subsidies on no other terms or conditions than those specified in the Act of Congress.

But it is now said that the *State* of Kansas is not bound by this transaction between its company and the Government; and that if "the terms and conditions" required by Congress have the effect to diminish or affect the State's power over the company, the State is not bound thereby, not being a party, or consenting thereto.

Our answer to this, is:

1st. That Congress did not need the assent of the State, and the provisions of the Pacific Acts would be valid, irrespective of the State's consent thereto.

2d. The State assented in advance by the Joint Resolution and Act of March 4, 1862.

3d. If the State had been silent before, its Joint Resolution of 1864 (Exhibit N. to Answer, pp. 20, 21) and of 1868 (Exhibit P to Answer, pp. 22, 23) and of 1874 (Exhibit Q to Answer, pp. 23, 25) are each an unquestionable assent to all that Congress had previously done, and a ratification of the action of the company accepting the Act of July 1, 1862, and a con-

sent that the company might accept the powers and subsidies granted by Congress on the "terms and conditions" required in the Pacific Act, and an implied waiver of any right or power on the part of the State inconsistent therewith.

It is elementary learning that a grant of corporate franchises is upon an implied condition subsequent, that the corporation shall fulfil the end for which it was formed; that it shall not exceed its powers, or usurp others. If this condition is violated the State may, but is not bound to, take advantage of the breach and enforce a forfeiture of the franchises, and put an end to the existence of the corporation.

2 Blacks. Com., 153.

People vs. Bank of Niagara, 6 Cowen, 196.

A right to a forfeiture may be "waived by acts or by an express agreement." Any act of the party inconsistent with the right to forfeit is a waiver.

2 Washb. Real Property, 454, pl. 19.

As the company, by its acceptance of the act of Congress, and of the subsidies given to enable it to construct the road, came under duties to the Government, some of which were to continue during thirty years and others in perpetuity, and as this acceptance by the company was with the assent of the State, it follows as a necessary consequence that the State waived or renounced any right to do any act or enforce any forfeiture which would interfere

with the full execution of the Act of Congress or disable the company from performing its duties thereunder.

All this inevitably leads to the conclusion that the *Acts of Congress are the paramount law of the Kansas branch of the Pacific system.* If so, the right of the State to a judgment of forfeiture does not exist.

I assume, without further argument the constitutional competency of Congress to pass the Pacific Acts. They have often been before the Supreme Court, and their validity has never been questioned. They rest upon the declared grounds of military and commercial necessity. The provisions of these acts are unquestionably valid. They constitute the paramount law. Any provision of the Territorial charter or other laws of Kansas in conflict with the Acts of Congress, or the duties of the company thereunder, must necessarily give way.

If, therefore, these Acts of Congress confer powers upon the company, or create rights in favor of the United States, with corresponding duties on the part of the company, which powers, rights and duties are inconsistent with the existence of the State's assumed power of dissolution and forfeiture, it follows, as a necessary result, that the latter power does not exist.

Let me here enumerate some of the more material rights secured to the United States by the PACIFIC ACTS, *which would be defeated by such a judgment as the State is now seeking,* in respect of the roads constructed by the Kansas Pacific Company under

the said Acts of Congress; and it has constructed no other.

Bear in mind that a judgment of dissolution and forfeiture puts an end to the corporate life of the company.

Section 5 of the Act of 1862 fixed and secured the rights of the United States in respect of the subsidy bonds issued to the company. It provided that, "on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the Secretary of the Treasury, in accordance with the provisions of this act, the said *road*, with all the rights, functions, immunities and appurtenances thereto belonging, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States, *provided* this section shall not apply to that part of any road now constructed."

This part of section 5 is not amended by section 10 of the Act of 1864.

The subsidy bonds do not mature for thirty years from their date, and the above implies the continued existence of the company until the bonds fall due, that being the earliest period at which the Secretary of the Treasury can require their redemption; and it also implies that the company shall be in possession of its "road, rights, functions, immunities, and appurtenances thereunto belonging."

These rights of the United States are inconsistent with a right of forfeiture and dissolution on the part of the State.

Again, *the right of the State to forfeit and dissolve*

is inconsistent with each of the CONDITIONS ON WHICH THE GRANTS OF CONGRESS WERE MADE.

In section 1 Congress granted corporate capacity to the *stockholders* of the Union Pacific Company.

Section 2 granted the right of way.

Sections 3 and 4 relate to the grant of lands.

Section 5 requires the issue of the subsidy bonds.

Section 6 then declares the "*conditions*" on which the aforesaid grants are made.

The alleged right of forfeiture on the part of the State, is in conflict with the following express conditions of the grants by Congress.

1. That the said "company shall keep the said railroad in repair and *use*."

2. That said *company* shall at all times (*i. e.* in perpetuity) transport mails, troops, &c., upon *said railroad* for the Government, whenever required to do so."

3. "That the Government shall at all times (*i. e.*, in perpetuity), have the preference in the use of the same, for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service."

This the Supreme Court has decided to "constitute a legislative contract between the company and the Government."

Union Pacific Co. vs. U. S., 104 U. S., 662.

4. "All compensation (reduced by the Act of 1864 to one-half,) for services rendered (by the company) for the Government shall be applied

to the payment of said bonds and interest *until* the whole amount is fully paid; and five per per cent. of the net earnings, *until* said bonds and interest are paid, shall be annually applied to the payment thereof.

JUDGMENT OF FORFEITURE AND DISSOLUTION DEFEATS THESE RIGHTS OF THE UNITED STATES which were the consideration and conditions of its grants; therefore the right to render such a judgment does not exist.

Could the State by a *repeal* of the Company's charter prevent the Company from using the road for these governmental purposes?

Again, the right of the State to forfeit is inconsistent with all the provisions of the act authorizing the Kansas Pacific to construct, in *Nebraska and Colorado*, beyond the limits of Kansas; with Sec. 17 of the Act of 1862, in which Congress reserved to itself the right of forfeiture; with section 18 of the Act of 1862 in which Congress, in order "to secure to the Government, at all times, the use and benefits of the road for postal, military and other purposes," reserved the right, "at any time to add to, alter, amend or repeal the act."

(In the Sinking Fund cases, 99 U. S., 700, 727, it has been adjudged that this power of amendment extends to the Central Pacific of California—a State corporation.)

In the Act of April 10, 1869, Sec. 4, "Congress directed the Attorney-General of the United States to investigate, whether or not, the charter and all the franchises of the Union Pacific Railroad Company

and of the *Central Pacific Railroad Company have not been forfeited*; and to institute all necessary and proper proceedings."

Act April 10, 1864, § 4.

Congress clearly understood that the United States and not the State was the *Sovereign*, and as such had the power of forfeiture.

From the foregoing, the FOLLOWING CONCLUSIONS *result*:

1. That the subsidized and aided line of the Kansas Pacific from Kansas City to Denver, and the branch from Leavenworth to Lawrence (being all the railroad the company ever built), were built under the provisions of the Pacific Railroad Acts of Congress, and *the right and duty to use the same exist under the said acts*, not only in Colorado, but in Kansas, and cannot be defeated by any act or action of the State.

2. If the Kansas Pacific Company had *not consolidated* with the other companies and was still intact and in the use and operation of its road, *no judgment of forfeiture and annihilation* at the instance of the State could be pronounced against it.

A fortiori, no such judgment can be given after consolidation.

THE CONSOLIDATION AUTHORIZED.

I proceed now to show:

THAT THE CONSOLIDATION WAS AUTHORIZED BY THE ACTS OF CONGRESS, AND BY THE LAWS OF KANSAS.

Only three possible views can be taken of the legal status of the Kansas Pacific Company prior to and at the date of the consolidation.

1. That as *respects the road in question*, its members were created by the Acts of Congress, a corporation *de novo;*

or,

2. That as *respects the road in question*, corporate power to build and use it were, with the assent of the State, directly conferred by Congress upon the Territorial corporation, and *quoad* these powers and the road constructed under them and the right to use such road, the company is under federal jurisdiction in such a sense and to such an extent as to preclude any right of forfeiture by the State;

or,

3. That as *respects the road in question, as well as in all other respects*, the company derived all of its franchises, including the franchise to build and use, from the State, and is subject to the State's power of visitation, dissolution and forfeiture, such power never having been waived or parted with by the State.

If either of the first two views of the legal status of the Kansas Pacific prior to and at the date of the consolidation is the true one (and it is immaterial which), the power of Congress to authorize it to consolidate with other like roads is too plain to be questioned or to require argument.

If the third view above of the legal status of the Kansas Pacific is the correct one (as the State is obliged to maintain), then the acts and action of the State show that the State consented to and authorized the consolidation, and waived any right or power, if it otherwise would have had it, to insist upon any forfeiture which would disable the company from fulfilling all the duties and contract stipulations required of it by the Acts of Congress.

I now proceed to show that either the first or second of the above views is the correct one (in this case it is immaterial which), and that the third view is not sound.

Proposition 1. Congress created the members of the Kansas Company a corporation de novo for the federal purposes named.

THE EFFECT OF THE 9TH SECTION OF THE ACT OF CONGRESS OF JULY 1ST, 1862, WAS TO CREATE THE ASSOCIATION OF NATURAL PERSONS THEN COMPOSING THE ORIGINAL LEAVENWORTH, PAWNEE AND WESTERN RAILROAD COMPANY, ON THEIR ACCEPTANCE AND CONSENT, WHICH WERE GIVEN, A CORPORATION OF THE UNITED STATES, FOR, AND TO TRE EXTENT OF THE NATIONAL PURPOSES NAMED.

Though the consent of the State of Kansas would not be necessary to the validity of the Act of Con-

gress in bestowing corporate capacity upon the *members* of the Territorial corporation, the legislative acts and resolutions of the State, both prior and subsequent to the Act of July 1st, 1862, and its long acquiescence in what was done under the Pacific Acts, recognize their validity in the amplest manner.

The argument in support of the foregoing proposition may be thus stated:

Congress had undoubted power itself to build a railroad for military and postal purposes, and to build it through the States, or any of them. In its discretion it might do the same thing through the agency of one or more corporations created by it for that purpose. In creating such corporations, Congress is under no restriction as to the persons whom it shall select as the corporators, their number or the proportionate interest which each may possess. *It is the* STOCKHOLDERS *of a corporation who are incorporated into and who constitute the corporation.* Accordingly, the Act of Congress of July 1st, 1862, section 1st, declares that the "*stockholders* of the Union Pacific Railroad Company shall constitute a body politic and corporate."

Stockholders are natural persons who contribute in fixed proportions the capital necessary to carry out the corporate scheme or enterprise. The corporate body becomes thereupon the sole legal representative of the associated natural persons for all the authorized purposes of the corporation. To incorporate an association of natural persons is simply to endow them with the faculty of acting collectively, without liability, *in solido*, as a single person, and to enable them to effectuate and carry on the

scheme or enterprise for which they have contributed their capital.

It is obvious that the same association of natural persons may be formed into two or more distinct corporate entities. Familiar and not unfrequent examples of this are where the laws of two or more different States incorporate the same association of individuals for the purpose of building or operating a continuous line of railroad. These bodies are in each State distinct corporate entities, and each State has jurisdiction and control over the corporation created by it or under its authority; but its power and jurisdiction stop with its geographical limits.

Ohio & Miss. R. R. Co. vs. Wheeler, 1 Black, 286.
R. R. Co. vs. Harris, 12 Wall., 65.
Bridge vs. Mayer, 31 Ohio St., 317.

Such is the status of a consolidated railway company, whose constituent companies are created by different States.

Miller vs. Dows, 94 U. S., 444.
Delaware R. R. Tax Case, 18 Wall., 206.
Phila. &c., R. R. Co. vs. Maryland, 10 How., 376.
In re Sage, 70 N. Y., 220.

This is clearly expounded by Mr. Justice MATTHEWS, in the late case of Clark vs. Barnard, U. S. Sup. Court, Oct. Term, 1882.

The case last cited strongly supports two propositions material in the case at bar:

1st. That the legal effect of the 9th section of the Act of July 1, 1862, was to incorporate *de novo* the members of the Leavenworth, Paw-

nee & Western R. R. Co., *quoad* all rights given, property acquired, or duties imposed under said Act of Congress.

2d. But if it is otherwise, and if the company named was, and ever remained, a *State* corporation of Kansas, it was such only as to the part of its road within that State, and as to the residue of its road in the then Territory and now State of Colorado, it is a corporation in and of that State; and if so, the defendant company was, not only within the spirit of policy of the Railway Consolidation Act of Kansas of 1870, (in force when the consolidation in question was made), but within its exact letter and express provisions, as the Kansas Pacific of Kansas had a constructed railway connecting at the State line with the Kansas Pacific of Colorado.

For convenience, all of the opinion of the Supreme Court, in *Clark vs. Barnard, supra*, relating to this branch of the case, is printed in the foot-note.

Opinion of the Supreme Court of the United States in CLARK VS. BARNARD ET AL., *Oct. Term*, 1882.

SAMUEL CLARK, General Treasurer of the State of Rhode Island, and the State of Rhode Island, Appellants,

vs.

GEORGE M. BARNARD, CHARLES S. BRADLEY, and CHARLES R. CHAPMAN, Assignees in Bankruptcy of the Boston, Hartford and Erie Railroad Company.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. Justice MATTHEWS delivered the opinion of the Court.

"The appellees, who were complainants below, filed their bill in equity, as assignees in bankruptcy of the Boston, Hartford & Erie

This legislation of Congress to provide a NATIONAL CURRENCY system was directly cotemporaneous with the legislation here under review, to provide for a National system of railways. Both proceed on the

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Railroad Company, against Samuel Clark, general treasurer of the State of Rhode Island, and the city of Boston, and Frederick U. Tracy, its treasurer. * * * The ground-work of the bill, whether it be regarded as directed against the officer or the State, is, that the transaction throughout was void, as *ultra vires* the corporation of which the complainants are the assignees in bankruptcy. And this presents the next question to be considered.

"That question arises and is to be determined upon the following statement of facts:

"The Boston, Hartford & Erie Railroad Company was originally created a corporation by the laws of Connecticut. Its charter conferred authority upon it in these terms: 'Said Boston, Hartford & Erie Railroad Company may purchase * * * the franchise, the whole or any part of the railway or railway property of any railroad company, located in whole or in part in this State, whose line, or a portion of whose line, of railway, constructed or chartered, now forms part of a railway line from the harbor of Boston, passing through Thompson to Williamantic, and from Providence through Williamantic to Hartford, Waterbury, and thence toward the North River, with the purpose of reaching a point at or near Fishkill, in the State of New York; * * * and said Boston, Hartford & Erie Railroad Company may make any lawful contract with any other railway company with which the track of said railroad may connect, in relation to the business or property of the same; and may take lease of any railroad, or may lease their railway to, or may make joint stock with, any connecting railway company in the line of, and forming a necessary part of, and running in the same general direction as, their said route, and between its terminal points.'

"In pursuance of this authority, the Boston, Hartford & Erie Railroad Company purchased the franchises and railroad of the Hartford, Providence & Fishkill Railroad Company. This latter company was a consolidated corporation, deriving its existence and powers from the laws, both of Connecticut and Rhode Island, whose road, as defined in the acts of incorporation, constituted a line within the general description contained in the section from the charter of the Boston, Hartford & Erie Railroad Company, already quoted. By a subsequent act of the Legislature of Rhode Island, the sale and transfer of the Hartford, Providence & Fishkill Railroad, its property and franchises, to the Boston, Hartford & Erie Railroad Com-

same view of the scope of the power of Congress. The original Act of June 3, 1864, to provide for a National Currency and for the establishment of National Banks, contains the section following, which

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pany, was ratified and confirmed, so far as said railroad was situated in that State; and it was thereupon further enacted, that the 'said Boston, Hartford & Erie Railroad Company, by that name, shall and may have, use, exercise and enjoy all the rights, privileges and powers heretofore granted and belonging to said Hartford, Providence & Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State.'

"The Hartford, Providence & Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston, Hartford & Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that State.

"Thereafter, in January, 1869, the Legislature of Rhode Island passed the act out of which the present litigation has grown, entitled 'An act in addition to an act entitled "An act to ratify and confirm the sale of the Hartford, Providence and Fishkill Railroad to the Boston, Hartford and Erie Railroad Company."' In its first section it is enacted as follows:

"'The Boston, Hartford and Erie Railroad Company, a corporation created by the General Assembly of the State of Connecticut, are hereby authorized and empowered to locate, lay out, and construct a railroad in extension of their line of railroad by them purchased of the Hartford, Providence and Fishkill Railroad Company, commencing at a point in their said purchased railroad at or near their freight depot in the city of Providence, thence running westerly and northerly by a line westerly of the state prison, a little easterly of the Rhode Island Locomotive Works, and thence by nearly a straight line, and crossing or running near to Leonard's Pond (so called), and thence passing between the villages of Pawtucket and Lonsdale, and over and above the Providence and Worcester Railroad; thence continuing to the easterly line of the State in or near the village of Valley Falls, there to meet and connect with a railroad extending westerly through North Attleborough, from the direction of Boston, authorized by the Commonwealth of Massachusetts.'

"The eighth section of the act is as follows:

"'Said railroad, when the same shall have been constructed,

stands to-day almost *verbatim* in the Revised Statutes of the United States:

SEC. 44. *And be it further enacted*, That any bank incorporated by special law, or any banking institu-

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shall be managed and protected in all respects according to the provisions of, and be subject to, an act entitled "An act to incorporate the Providence and Plainfield Railroad Company," and the several acts in addition to and amendment thereof, and the general laws of the state.'

The act thus referred to as the 'act to incorporate the Providence and Plainfield Railroad Company,' was the charter of the corporation by that name, in the State of Rhode Island, that, by consolidation with a Connecticut company, formed the Hartford, Providence and Fishkill Railroad Company.

'The twelfth section of the act, recited in the complainant's bill, is as follows:'

"This act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this General Assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the Governor of this State, in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January, A. D. 1872.'

"This act of the Legislature of Rhode Island was duly accepted by the stockholders of the Boston, Hartford and Erie Railroad Company; the bond required by the twelfth section, as already set out, was executed and delivered; and the certificate of indebtedness, in lieu of sureties, was given by the company and accepted by the state.

"It is now argued by counsel for the appellees, that the party which, in all these transactions, was dealing with the State of Rhode Island was the Boston, Hartford and Erie Railroad Company, in its character as a corporation of the State of Connecticut; that, as such, it had no power, under the charter granted by that State, to build or own a railroad directly connecting Boston and Providence, nor had it, as such, any capacity to receive a grant of such a franchise; that, consequently, everything done or attempted in that behalf was *ultra vires* and void.

"But the Boston, Hartford and Erie Railroad Company was also a corporation of Rhode Island. As such, it owned and operated a railroad within that State, and had received and exercised franchises under its laws, to which it was in all respects subject. It was the assignee of the road and rights connected therewith, formerly belonging to the Hartford, Providence and Fishkill Railroad Company; and

tion organized under a general law of any *State* may, by authority of this Act, become a national association under its provisions, by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this Act may be executed by a majority of the directors of the bank or banking institution;

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it was this corporation, dwelling and acting in Rhode Island, that the legislature, by the act in question, authorized to exercise the additional powers it conferred.

"If it had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although as a Connecticut corporation it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter to accept and exercise any franchises not contemplated by it, yet the natural persons, who were corporators, might as well be a corporation in Rhode Island as in Connecticut, and, by accepting charters from both States, could well become a corporate body, by the same name and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital or membership. Such was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize. 'Nor do we see any reason,' as was said by this Court, Mr. Justice Swayne delivering its opinion, in *Railroad Company vs. Harris*, 12 *Wall.*, 65-82, 'why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad*, any property within its territorial jurisdiction. That this may be done was distinctly held in *The Ohio and Mississippi Railroad Company vs. Wheeler*, 1 *Black*, 297.' The same view was taken in *Railway Co. vs. Whitten*, 13 *Wall.*, 270; *Railroad Co. vs. Vance*, 96 *U. S.*, 459; and in *Memphis and Charleston Railroad Co. vs. Alabama*, decided at the present term. The question of the powers of the Boston, Hartford and Erie Railroad Company, as a corporation in Rhode Island, and of the legal effect of its acts and transactions performed in that State, is to be determined exclusively by the laws of that State, and not by those of Connecticut, which have no force beyond its own territory. It results, therefore, that the doctrine of *ultra vires*, as here urged by the appellees, has no place in this controversy."

and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and change and to convert the said bank or banking institution into a National association under this Act. And a majority of the directors, after executing said articles of association and organization certificates, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a National association. The shares of any such bank may continue to be for the same amount each as they were before said conversion; and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of this Act; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank or both may be organized under and have accepted the provisions of this Act. When the Comptroller shall give to such association a certificate under his hand and official seal, that the provisions of this Act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects as are prescribed in this Act for other associations organized under it, and shall be held and regarded as an association under this act; *Provided*, however, that no such association shall have a less capital than the amount prescribed for banking associations under this Act.

13 U. S. Stat. at Large, ch. 106, sec. 44, p. 112.

Nothing could more strongly declare the absolute power of Congress, with the assent of the shareholders, to summarily reincorporate the shareholders of any State corporation which is organized to discharge any function proper to be assumed by the United States.

In the Farmers' National Bank vs. Dearing, 91 U. S. 29, the Supreme Court held that the usury

laws of the States had no application to National Banks, and that the only penalty for usury was that prescribed in the National Banking Act itself.

In giving the unanimous judgment of the Court Mr. Justice SWAYNE, made the observations quoted below, which equally apply to the case under consideration:

"The constitutionality of the Act of 1864 is not questioned. It rests on the same principle as the act creating the second Bank of the United States. The reasoning of Secretary Hamilton and of this Court in *McCulloch vs. Maryland* (4 Wheat, 316), and in *Osborne vs. The Bank of the United States* (9 *Id.* 708), therefore applies. The National banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole jugde."

"Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power, which a single State cannot give. Against the national will the States have no power, by taxation or otherwise, to retard, impede, bother or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.' (*Bank of the United States vs. McCulloch, supra; Weston and others vs. Charleston, 2 Pet. 466; Brown vs. Maryland, 12 Wheat., 419; Dobbins vs. Erie County, Id., 419.*)

"The power to create carries with it the power to preserve. The latter is a corrollary from the former.

"The principle announced in the authorities cited is indispensable to the efficiency, the independence, and, indeed, to the beneficial existence, of the General Government; otherwise it would be liable, in

the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The Government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of Government may be divided into four classes:

"Those which belong exclusively to the States;

"Those which belong exclusively to the National Government;

"Those which may be exercised concurrently by both;

"And those which may be exercised by the States, but only with the consent, express or implied, of Congress.

"Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. (*Gilman vs. Philadelphia*, 3 Wall., 713; *ex parte McNeil*, 13 *Id.*, 240.)

"The power of the States to tax the existing national banks lies within the category last mentioned.

"It must always be borne in mind that the Constitution of the United States, 'and the laws which shall be made in pursuance thereof,' are 'the supreme law of the land' (Const., Art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local Constitution and laws.

"In any view that can be taken of the thirtieth section, the power to supplement it by State legislation is conferred neither expressly nor by implication.

"There is nothing which gives support to such a suggestion."

It is within judicial knowledge that the passage of this law and subsequent proceedings under it were directly at the suggestion and under the superintendence of the late Chief Justice of the United

States; that many hundreds of State banks availed themselves of the power to reincorporate here given. In case of a *quo warranto* addressed to any one of all those banks the sufficiency of the power of Congress would be far more necessary to the defendant than in this case, for the sanction of the State would in that case be wholly wanting. Every complaint and bill in equity by any one of all those banks begins with a recital of its corporate authority under the Act of Congress above mentioned; and and yet in no known instance has the source of corporate authority been so much as drawn in question.

Congress being under no restriction as to the number of persons whom it may incorporate and the interest of each in such corporation, has power, to effectuate any national purpose, to say to the persons composing a *State* corporation, as was done under the national bank law: "You may, if you choose, become a corporation of the United States, with the same organization, members, property and respective interests as at present, and with the franchises which this act confers." It may compendiously designate the *persons* thus incorporated by the name under which they were known as a corporation under the State law.

The natural persons who constituted the members of the Leavenworth, Pawnee & Western corporation, by accepting in their corporate name the grants made by Congress, became by implication and neccessary effect a corporate body by the same name for the purpose of carrying into effect the new powers granted, and performing the duties required by

Congress. Clearly the natural persons who constituted the Kansas corporation might accept corporate powers and franchises from any other competent source. If this be the true view of what Congress did, in section 9 of the Act of July 1, 1862, it is immaterial whether Kansas assented to the act or not. Congress would not be bound in any view, to obtain the assent of the State to incorporate any association of natural persons; however it might be if it should undertake compulsorily and against the will of the State, to transmute a *State* corporation into a *Federal* corporation.

"The settled doctrine is that a *corporation may be* CREATED BY IMPLICATION, as well as by the use of words. If powers and privileges are conferred upon a body of men, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the Legislature, and this can be shown constructively as well as expressly. This is well illustrated in a case in Massachusetts (Inhabitants, etc. vs. Wood, 13 Mass., 193), where the question was whether the plaintiffs were a corporate body, with power to sue. They were not incorporated expressly. But, by statute, the inhabitants of the several school districts were empowered, at a meeting properly called, to raise money to erect, repair, or purchase a schoolhouse, to determine its site, etc., etc,, the majority binding the minority. The case was argued by able counsel, and, after several consultations, the judges of the Supreme Court finally agreed in the opinion that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a schoolhouse and to make to them a lease of land. But the intention of the Legislature, where it is sought to show that a corporation has been created by implication, must satisfactorily appear."

1 Dillon Munc. Corp., 3d Ed., Secs. 42-43, and cases cited.

Angell & Ames on Corp., Secs. 76–78.

The Act of Arkansas establishing a State Bank, there being no express words of incorporation, was held to create a corporation by implication.

Mahoney vs. State Bank, 4 Ark., 620.
Murphy vs. Stone, 2 English (Ark.), 57.
Woodruff vs. Atty.-Genl., 3 English (Ark.), 236.
Cited Angell & Ames, Sec. 77.

It is plain that the rights conferred and the duties required by the ninth section of the Act of July 1st, 1862, upon the Leavenworth, Pawnee & Western R. R. Co. could not be enjoyed and performed without the exercise of corporate powers.

The result of this reasoning is that, in legal contemplation, there may be two distinct corporate entities having the same name; one owing its origin to the *State*, and the other to *Congress—e. g*, a road built under the provisions of this Act of Congress would, for all the purposes of the act, be under the control and jurisdiction of Congress; a road built under its territorial franchises, and not under the Act of Congress, would be under the control and jurisdiction of the State.

As shown elsewhere in this argument, both Congress and the State acted, from first to last, on the assumption that Congress was supreme in respect of the roads which should be built under the provisions of the Act of Congress, and by means of its subsidies.

Proposition 2. Congress granted the corporation originally created by the Kansas territorial charter,

new and additional federal franchises, to construct the road which was built, and as to this road, the franchise to use the same is federal in its origin and nature, and is not subject to forfeiture by the State.

If the view above presented under proposition 1 (*ante* pp.) is not correct, viz.: that Congress created by *implication* the association of natural persons composing the Leavenworth, Pawnee & Western Company a corporation of the United States, for the purposes specified in the Pacific Railroad Act, then under THE PREVIOUS AND SUBSEQUENT ACTS AND RESOLUTIONS OF THE LEGISLATURE OF THE STATE OF KANSAS, THE EFFECT OF THE PACIFIC RAILROAD ACT, ON BEING ACCEPTED BY THE COMPANY, WAS DIRECTLY TO CONFER UPON THE COMPANY, BY FORCE OF THE CONGRESSIONAL ENACTMENT, THE ADDITIONAL "POWERS, RIGHTS, PRIVILEGES AND IMMUNITIES" SPECIFIED IN THE ACT OF CONGRESS, INCLUDING THE POWER TO CONSOLIDATE.

This proposition has been framed after a careful study of the judgment of the Supreme Court of the United States in the "Sinking Fund case," against the Central Pacific of California, arising under the Thurman Act.

Central Pacific R. R. Co. vs. Gallatin, 99 U. S. 700.

The Central Pacific was, says the Court, "formed and organized under the laws of the State of California." It was objected by the company that being a corporation of the *State*, "it took," to use the

language of Mr. Justice FIELD in his dissenting opinion (*Ib.*, p. 759) "its life, and all its attributes and capacities from the State; that there was no grant by the United States to the Central Pacific Company of corporate rights, privileges and immunities; that no attribute of sovereignty was exercised by the United States in its creation; that whatever *powers*, rights and privileges it acquired from the United States, it took under *contract* with them and not otherwise." These views were strongly pressed upon the Court by able counsel.

But the majority of the Court rejected them as unsound. The Court held that the effect of the act of July 1, 1862 (to which it says (*Ib.* p. 728): "*The State, by implication at least, had given its assent*"), when accepted by the company which thereby, says the Court (*Ib.* p. 728), "*Voluntarily submitted itself to legislative control by Congress,*" was to confer upon the company, "*an addition of corporate powers* and pecuniary resources." The Court adds: "But for the *corporate powers* and financial aid *granted* by *Congress*, it is probable that the road would not have been built."

After reviewing the legislation, National and State, the Court thus sums up the result, in words carefully weighed:

"Under this legislation, we are of the opinion that, *to the extent of the powers, rights, privileges and immunities granted these corporations by the United States, Congress retains the right of amendment*, and in this way may regulate the administration of the affairs of the company in reference to debts created under its own authority, in a manner not inconsistent with the original State charter, as modified by the State Aid Act of 1864, accepting

what has been done by Congress. This is as far as it is necessary to go now. It will be time enough to consider what more may be done when the necessity arises."

In this case, the Court held the Thurman Act of 1878 valid, which required the Central Pacific Company each year, until its subsidy bonds received from the United States should become due, to pay into the National Treasury 25 per cent. of its net earnings, to be invested as a sinking fund and eventually applied in payment of the subsidy debt and interest.

Can this adjudged right of the United States and this adjudged duty of the Central Pacific Company, be defeated by a judgment of the State tribunals, dissolving the corporation and forfeiting its franchises?

The Kansas Company assented to the Pacific Acts. The State of Kansas requested of Congress the enactment of these acts, and afterwards recognized them as valid exertions of its power in respect of this particular company.

The evidence of the assent of the State to the grant of the *power* to *consolidate*, which is *all* that is in controversy in this suit, is peculiar, being found, as I now proceed to show, in legislation of the State, which anticipated the Act of Congress, as well as in subsequent legislative resolutions.

With a view of meeting and influencing the pending action of Congress in the creation of the Union Pacific Railroad Company, the act of the Kansas Legislature of March 4, 1862 (Exhibit D to Answer, p. 13), was made to

take effect *upon its publication*, and the Secretary of State was directed to cause it to be published *immediately* after its passage. With a like view of meeting and influencing the pending action of Congress, the Joint Resolution of the Kansas Legislature of March 4, 1862 (Exhibit L to Answer, p. 18), was adopted, asking for the passage of the Rollins Hill and the ratification of the Pottawattomie Treaty, and that the Kansas Congressional delegation "use every exertion to secure these objects," and directing that the Governor transmit copies to the Kansas Senators and Representatives in Congress with the "request that they *immediately* lay the same before Congress," which the Debates in Congress show was done.

Thus, on the 1st day of July, 1862, when Congress passed the act creating the Union Pacific Railroad, the State of Kansas had not only declared its *general policy in relation to consolidation*, but in terms had given its assent in advance to the consolidation of its road with the anticipated corporation to be created by the United States; and in substance, notified Congress by the said Joint Resolution, which was actually communicated to it, and by the said act, which was *promptly published*, of that fact and that policy. In view of this assent in advance, Congress framed its legislation and provided for such consolidation. There was, therefore, an offer by Kansas and an acceptance by Congress, which is not capable of revocation, even if it were true, as it is not, that the State of Kansas, by any subsequent legislation, has ever attempted to revoke it.

This Act of Kansas of March 4, 1862, stood without any intervening legislation of the subject, until it was omitted in the compilation of its laws in 1868, *and what is more material, there was not at the time of the consolidation, nor has there been at any period any other legislation of Kansas of the subject of consolidation, or any declaration, directly or indirectly* ALTERING THE POLICY OF THE STATE IN REGARD TO THE SAME.

The foregoing shows the EXPRESS ASSENT on the part of the State of Kansas, to the power and right of the Kansas company to consolidate.

It also IMPLIEDLY ASSENTED thereto.

Thus, in March, 1864, after the original Act of July 1, 1862, incorporating the Union Pacific Railroad Company was passed, which act by its sixteenth section gave to any two or more of the corporations named in the act, unrestricted power to consolidate by merely filing notice of such consolidation in the Department of the Interior, the Kansas Legislature, by joint resolution (printed as Exhibit N to Answer, p. 20), with knowledge that the company had filed its acceptance of the Act of 1862, referred in terms to that act and to the company, asked for an amendment and alteration of the location of the road, and that the President withold his approbation of the present location. Thus this act of 1862, in all that relates to the roads and interests of the State, *including the right of consolidation*, was before the Legislature, and by just *implication*, and *all* of its provisions, except those specially complained of or sought to be amended, were assented to by the State. If it were otherwise, the objection of the State would have been expressed.

So the resolutions of Kansas in 1868 (Exhibit P to Answer, p. 22), and in 1874 (Exhibit Q to Answer, p. 23), the one asking for an extension of the Union Pacific Railroad, Eastern Division, and that additional subsidies be granted for that purpose; and the other complaining of violations of the charter of the Union Pacific Railroad Company, can have no other construction than that of an *implied, if not express, assent* to the acts of Congress, conferring new powers and exacting new duties of the corporation, without complaining that any one of these powers was repugnant to or incompatible with the policy of the State.

We have, therefore, no question in this case as to the authority of Congress to confer additional powers, and particularly the power to consolidate, upon a State corporation against the will of the State. When both the corporation and the State assent, as in this instance, there is no difficulty in holding, as the Supreme Court in the Central Pacific case actually held, that Congress may, for national purposes, confer upon a State corporation additional corporate powers, which are, therefore, *federal*, both in their origin and nature, superseding *pro tanto* the powers previously conferred by the State, and paramount in legal force and obligation. To the extent of the federal powers thus granted for national purposes, the assent of the State, if indeed, such assent be necessary, amounts to a surrender or waiver of the powers previously possessed by the State.

The granting by Congress, under such circum-

stances, of additional corporate powers to a State corporation is different from the case of one State undertaking to change or enlarge the power of a corporation of another State. Because of the inability of a State to give to its enactments an extra territorial operation, one State cannot change or enlarge the powers of a foreign corporation. No such difficulty exists when Congress for national purposes confers new franchises upon a State corporation with its assent and that of the State. If the federal powers cover the whole extent of the State powers, it would supersede them; if it did not cover them fully, it would supersede them *pro tanto*.

In the latter event, we would have but a new addition to a class of cases, constantly arising in our dual form of Government, when it becomes necessary to mark and trace the boundary between federal and State authority. But when these boundaries are defined, the federal law is supreme, and all conflicting State laws give way.

When Federal and State legislation cover precisely "the same ground, they cannot co-exist."

> People vs. Comp. Genl. Transatlantique (U. S. Sup. Court, 1883), Sup. Ct. Rep., 87.

This is axiomatic in our jurisprudence.

The position of the State in this case *must* be either,

1st. That the Act of Congress so far as it conferred powers upon the Kansas company is

void, and the authority of the State over that company is unaffected thereby.

Or,

2d. That the powers conferred by Congress for national purposes upon that corporation, though conferred with the assent of the State, are subject to its sovereignty, and do not originate any rights over which the *superior* power of the State to enforce a forfeiture does not extend the same if the powers had been granted by the State itself.

Whether the effect of the Act of Congress in respect of the Kansas branch of the Pacific system was to incorporate *de novo* the association of natural persons, known as the Leavenworth, Pawnee & Western Railroad Company, or to confer additional corporate powers upon that company, the result is the same.

All of the road ever built by the Kansas Company was built with the assent and at the request of the State, under the authority of Congress, and its authority over it is supreme and exclusive, at least to the extent necessary to enable the company to exercise these powers which Congress gave and to perform the duties which congress required.

It logically and necessarily follows:

1st. That the State cannot defeat the purposes of Congress by dissolving the corporation and distributing its property to its creditors and stockholders.

2d. That the Congress could authorize this company to consolidate the road which it built,

under the provisions of the Act of Congress, with a connecting road of the Pacific system without requiring the assent of the State to the Pacific Act which gave the power to consolidate. But as the State has repeatedly recognized the Pacific Acts in their application to the Kansas branch, it is really unnecessary to inquire what power Congress could have exercised over the Kansas Company against the will or consent of the State.

I have already pointed out (*ante*, p.); that to make sure that this system of roads, including the main line and its branches, should *all* be constructed, to the end that they should form and be used as "one continuous line," Congress gave to the various companies named, united, alternate and substitutionary powers of construction. That the three companies which afterwards consolidated might have consolidated with a view to build their respective roads is clear.

Consolidation is a policy entirely compatible with the scheme and purpose of Congress. The duties enjoined by Sec. 12 of the Act of 1862, Sec. 15 of the Act of 1864, and the Act of June 20, 1874, "to operate all of said road and branches as *one connected and continuous line, without discrimination*," &c., require the companies concerned to perform acts and make agreements in respect of fares, freights, time tables, &c., which their diverse interests constantly tempt them to disregard, and for which that *unity of interest* which comes alone from CONSOLIDATION is, and was seen by Congress to be, the best, if not the only remedy.

Hence, in the 16th section of the Act of 1862, it gave the power, without condition of the State's assent, "to all or to any two or more of the railroad companies named herein, to form themselves into one consolidated company;" and only required notice of such consolidation to be filed in the Interior Department.

Sec. 16, Act 1862.

Section 16 of the Act of 1864 confers the same power, absolutely and without qualification. It only annexes a restriction that the terms, condition and manner of the consolidation agreed on, "shall not be incompatible with the act or the laws of the State or States in which the roads of said companies may be."

This section authorizes the consolidated company:

1. To adopt a new name.
2. To fix the amount of its "capital stock, not to exceed the actual cost of the roads so to be consolidated."
3. Puts the new company "in place and substitution of the said companies so consolidated, respectively."
4. Makes the provisions of the acts of Congress, appertaining to each of the constituent companies, "so far as practicable, apply and be of force as to such consolidated organization."

Sec. 16, Act 1864.

As the power to consolidate is *expressly* conferred, *eo nomine*, it is unnecessary to find it by implication or construction.

But if there were no other power given than the power to the constituent companies *to fix the amount of new capital stock*, that would confer full power to consolidate, with all the legal effects of a consolidation.

This precise point is adjudged by the Supreme Court in the late case of Branch vs. Jessup, 106 U. S., 468.

As some of the observations of the Court in the case just cited are instructive upon questions arising in this case, it will be shortly stated:

The Atlantic & Gulf R. R. Company purchased from the South Georgia & Florida R. R. Company its Thomasville branch, extending from "Albany to Thomasville, including the *franchise of constructing and using the same and an incorporation of all of its stock* with the stock of the purchasing company" (p. 479).

The power of the vendor company to sell, and of the purchasing company to buy, were contested by persons claiming to be creditors of the vendor company and who were shareholders in the purchasing company, "as being void as against public policy and *ultra vires*" (*Ib.* 474).

As to the power of the South Georgia company to sell:

The vendor company had by statute power "at any time to *incorporate their stock* with the stock of any other company on such terms as might be mutually agreed upon" (p. 477).

It had also power "to have, purchase, possess, enjoy and retain lands, hereditaments, tenements, goods, chattels and effects of whatever kind, nature or quality the same may be, and the same to sell, grant, demise, alien or dispose of" (p. 477).

On this point the judgment of the Court is thus expressed (pp. 478, 479):

"It seems to us clear that these powers were sufficient to enable the company to sell its road and franchises to any company competent to purchase them. As a general rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. *But this company had, by its charter, express power to incorporate its stock with the stock of any other company.* This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfilment of these purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them. But where, as in this case, power is given to *incorporate the capital stock with the stock of any other company*, a very large addition is made to the ordinary powers granted to a company. *In this country, the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization.* The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. *Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply.* In view of the large power thus conferred upon the

the South Georgia and Florida Railroad Company, we cannot doubt that it had full power to enter into the arrangement made with the Atlantic and Gulf Railroad Company for the transfer of *that portion of its line extending from Albany to Thomasville, including the franchise of constructing and using the same, and an incorporation of all its stock issued for the construction of said road with the stock of the latter company.*

It is true that the South Georgia and Florida Railroad Company did not part with its entire franchises. Power was given to it by its charter to construct a road from Thomasville to the Florida line (being a distance of about fifteen miles due south) and to connect with any other road at such points as it might deem best. But this extension is mentioned as a distinct enterprise, has never been entered upon, and would have no value without a connection with some railroad in Florida, for which, so far as appears, no authority has thus far been accorded by that State. The authority to make it is nominal only if it has not entirely expired by lapse of time; and could be of little use to the Atlantic and Gulf Railroad Company, which has never issued any capital stock under it or with a view to its use, seem to be in reality a mere shadow without any substance. All the capital stock which the company ever provided for was that which went to the building of the road from Thomasville to Albany, and that at its very inception was incorporated with the stock of the Albany and Gulf Railroad Company: the stock of the latter company being issued and accepted in the place of it. So that in truth the terms of the charter have been literally carried out. At all events we think that the arrangement made with the latter company was within the powers given to the South Georgia and Florida Railroad Company; and this arrangement was fully assented to and acquiesced in by every subscriber to its stock as before mentioned." 106 U. S., pp. 478, 479.

As to the power of the Atlantic & Gulf Company to buy:

The purchasing company had power to construct

a road from Thomasville to Albany (p. 483). It had power,

"To have, purchase, receive, possess, enjoy and retain lands, rents, tenements, hereditaments, goods, chattels and effects of whatsoever kind, nature or quality, and the same to sell, grant, demise, alien and dispose of" (p. 482).

This was held to confer upon the Atlantic & Gulf Company the power to purchase the branch and the right to use it from Thomasville to Albany.

On this point the judgment of the Court (p. 484) was as follows:

"Then since the consolidated company had authority to construct a railroad from Thomasville to Albany, and to establish the railroad connection between Savannah and Albany in that way, and had the general power to purchase and receive property of every conceivable kind, nature, or quality (limited, of course, by the general objects of its charter), what was to hinder its purchasing from the South Georgia & Florida Railroad Company its line of road between Thomasville and Albany, and paying for it by the issue of its own stock, an arrangement which, as we have seen, the South Georgia & Florida Railroad Company on its part had a perfect right to make? It seem to us that this question is not hard to answer, but that it is clear that the one company had the right to purchase this road as fully as the other company had the right to sell it, and that the right of both was fully given by the charters and laws which gave them their respective powers. We do not mean in the slightest degree to disaffirm the general rule that a corporation cannot dispose of its franchises to another corporation without legislative authority. But we think that the authority clearly existed in this case, being fairly derived from the legislation which affected the two companies without any forced or strained construction of its terms."

106 U. S., p. 484.

"As to the South Georgia & Florida Railroad Company, it has no claim at all. It stock, so far as the railroad in question is concerned, was incorporated with that of the Atlantic & Gulf Railroad Company, *with which it become amalgamated and identified. Its separate existence, pro tanto, became merged in the latter company.* How far it can be galvanized into life for the purpose of the extension of the road from Thomasville to the Florida line, it is not necessary to inquire. That question has nothing to do with the one now in hand" (*Ib.*, p. 485).

This case clearly holds that legislative power "*to incorporate the stock of one company with the stock of any other company,*" gives the selling company the power to transfer the railroad and its franchises to another company, even to the extinguishment of the corporation itself, and its absorption into a different organization" (p. 478), and the purchasing company has the power to buy, "including the franchise of constructing and using the same."

COMING NOW TO THE CASE IN HAND, the Court will notice that the power to consolidate is by given Congress: the only restriction is that the terms and manner of its exercise must not be *incompatible* with the Act of Congress or the laws of the State where the road is.

The State has assented (if its assent were necessary), *that* CONGRESS *might give this company and the other the power to consolidate. Congress accordingly conferred the power to consolidate. The power was to be given by Congress and by it alone, the State having given an unqualified consent. The companies have exercised this power and the* STATE *cannot question the consolidation as to its manner*

or terms. Congress only can question it on such grounds.

So far as this proceeding by the State is an attempt to punish for transcending the power to consolidate thus given by CONGRESS, *it is an attempt to punish for the violation of the laws of the United States, which is beyond the power of the State.*

Upon only one ground can the State question consolidation and that is, that the Act of Congress that conferred the power is, in this respect, wholly void and of no effect, or is beyoud the terms of its consent.

What is the true interpretation of the clause which, after authorizing the consolidation, prescribes as to the terms of such consolidation that those terms shall not "be *incompatible* with the laws of the State." Does it mean incompatible with the laws of the State as to the "terms" of consolidation? If so, since there were no laws of the State of Kansas governing such consolidation, the provision has no application to the case in hand.

But if it be assumed that by the "laws of the State" is intended such laws as might be at any time thereafter passed by the State, it will be admitted, we think, that they must be laws consistent with the consolidation to which the State has assented. If they be general laws purporting to apply to all the corporations of the State and are repugnant to the powers of consolidation conceded by the State, they must be held not to apply to the corporation to which such concession has been made.

The petition sets out in detail what it relies on as the "laws of the State," existing at the time of the

consolidation in question, and on which it rests its charge that they are laws "incompatible" with the terms of the consolidation, as shown by the articles. To these specifications the State must, in this suit, we think, be confined, and it is to be noted that this suit is not founded on the liability of the defendant to have its charter vacated for non-compliance with the provisions of those subsequent laws; the sole ground on which it is framed, on which it rests, and on which the forfeiture is prayed, is the *illegal consolidation*, not the infringement of the other laws of the State which are merely specified and incorporated with the petition as showing that the consolidation when effected was not "compatible" with those laws.

Now, a scrutiny of the terms of the articles of consolidation and of the several charges in plaintiff's petition of violation of the laws of Kansas, passed since the consolidation was authorized by Congress and assented to by the State, will show that those articles of consolidation do not require any one of the acts or omissions which are charged in the petition as violations of those laws. The "*terms*," therefore, of the consolidation are in no one respect incompatible with those laws of the State. If the consolidated company has in fact, though not required so to do by the articles of consolidation, violated those subsequent laws, and if, in legal construction, those subsequent laws bind the consolidated company, than the State must confine its remedy for such transgression to some proceeding which shall rest on those violations and not in a proceeding which seeks to vacate defendant's

charter on the sole ground of unlawful consolidation and not on acts done subsequently in violation of subsequent laws.

Again, it is submitted that if compatibility with the laws of the State as to the terms of consolidation does not refer solely to such laws of the State as govern consolidations, yet it would be absurd to contend that, after having distinctly assented to consolidation as provided for in the Acts of Congress, the State can defeat a great public policy evinced by those acts by a course of subsequent legislation not directly withdrawing its assent but enacting provisions which, if held applicable to the defendant corporation (thus by Congress and with the assent of the State authorized to consolidate), would render such consolidation impossible.

I repeat that the restriction of not being *incompatible*, here imposed, is not upon the *power* of consolidation. The power is given absolutely. The limitation gives force only to such portion of the laws of any State as relate to the terms or manner of consolidation, irrespective of the power. *The policy of Congress is not made contingent upon that of the State.* The phraseology is not that the consolidation may be made "if au- "thorized by the State, and upon any terms and in "any manner authorized by the law of the State." The grant is absolute, and the power to be exercised "upon any terms and in any manner *not incompatible with*" the State law. *The power could be exercised freely if the State law were silent on the subject.* And the State law of March 1, 1870, is silent upon the subject of the consolidation of, or

consolidation with, *Federal* corporations. Such consolidation is, therefore, not *incompatible* with the act of the State on the subject of consolidation of railway companies.

The laws of Kansas, in force at the time of this consolidation, January 24, 1880, embraced two features.

(*a*) A grant of power to certain railroads to consolidate, *i. e.*, to such as were wholly within the State, or connected at the State line with other roads.

(*b*) A reservation that the transfer involved with such consolidation should be "with all the rights, "powers, privileges and immunities, and subject to "all the obligations and liabilities to the State, "which belong to or vested upon either of the com- "panies making such consolidation."

This relates to the *effect* of consolidations made under the laws of Kansas above mentioned, and not to its *manner* or *terms*. Those words are used in the Act of Congress with reference to the features of the transaction itself, and not with reference to the power to make it, or its effect when made. Congress is not asking the consent of the State, but only providing by reference for fair terms and a proper method.

In no case could the proviso of the law of Kansas be operative to make this consolidation invalid. It prescribes an effect which attaches inevitably and by operation of law to the mere fact of consolidation. The companies themseves therefore can do nothing with regard to it which will have any effect whatever.

The laws of Kansas, therefore, at the time of this consolidation contained no provision as to terms or manner of railway consolidation which can affect the validity of the present consolidation.

The only way in which such consolidation can be held to be unauthorized by law is to suppose that although Congress, designating by name the Leavenworth, Pawnee & Western R. R. Co. gave to that company an express power to consolidate; although Congress in so doing acted in pursuance of an earnest, permanent and comprehensive public policy; although in so doing Congress acted clearly within its constitutional power; and although, by the use of the terms "not incompatible with" any restrictive operation of the State laws was required to be express; yet all these should be annulled by expanding the words "manner" and "terms" so as to include under one or other of them, the limitations of the class of roads to which the power to consolidate at all was given by State law.

But even this is immaterial since the answer and exhibits show that the consideration was effected in such a manner and under such circumstances as would have made it lawful if the Kansas Pacific is to all intents and purposes a. corporation of the State even as respects the roads built under the Acts of Congress.

Consolidation the general policy of Congress:

Congress not only gave the companies named in Pacific Railroad Acts of 1862 and 1864, the power to consolidate, but July 26, 1866, when it made a grant of land to the Southern Branch of the Union Pacific

(now the Missouri, Kansas & Texas Railway Company), which connects at Fort Riley, Kansas, with the Kansas Pacific, it authorized "*any* railroad company chartered under any law of the United States, or of any State to connect with and consolidate with this railroad company, on such terms as shall not be against the public interest, or the interest of the United States."

14 Stats. at Large, 291, § 11.

So in the Act, July 25, 1866, the same power was given to the Kansas & Neosho Valley Railroad Company.

14 Stats. at Large, 238, § 11.

M. K. & T. Compilation, pp. 36, 148, 153.

So in the Texas & Pacific Charter, March 3, 1871, Sec. 4. Congress authorizes Texas & Pacific "to CONSOLIDATE on such terms as may be agreed upon by the parties, with any railroad company or companies heretofore chartered by Congressional, *State or territorial* authority on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean."

This charter, sec. 1, authorized the construction of a railroad from Marshall, Texas, through *Texas*, New Mexico, Arizona, and *California* to the San Diego on the Pacific in California, and did not require the consent of either the State of Texas or California.

Sec. 19 makes the Texas & Pacific a military and post road to carry mails, troops, &c., and enacts

that "no act of the company, nor any *law of any State* or territory shall impede, delay or prevent the said company from performing its obligations to the United States in that regard."

The Texas & Pacific as it exists to-day is a consolidated company, created by the consolidation of two State corporations with the Federal corporation.

See Texas & Pacific Compilation.

Consolidation of continuous roads is now and always has been the policy of Kansas.

By act of March 5, 1862, passed with reference to the then pending Congressional Pacific Railroad legislation, the State of Kansas authorized "*any* railroad company now organized, or which may hereafter organize under the laws of Kansas, to unite or consolidate with any other company or companies now organized, *or which may hereafter be organized under* THE LAWS OF THE UNITED STATES, &c."

Exhibit D in Appendix 1, p. 13, gives the text of this act.

The provision as to Potawatamie lands shows that the legislature had the Pawnee Company in its mind in the passage of this act.

This act was never expressly repealed; it was only repealed, if at all, by being left out of the General Compilation of 1868.

In 1865 (see text, Exhibit J to Answer at p. 17 of said Exhibit) the legislature passed an act authorizing "any railroad company in this State forming a continuous or connected line with any other railroad

company, either in or out of the State, to consolidate into a single corporation."

In 1870 it passed the existing act to provide for the consolidation of railways.

See Exhibit K to answer at p. 18 of Exhibit.

This review shows a uniform STATE POLICY TO AUTHORIZE THE CONSOLIDATION *of continuous lines of road, whether within the State or without it.*

The answer and exhibits show if the State laws of Kansas and other States in force in 1880 are applicable to the consolidation now under consideration, that the State laws have been complied with as well as the acts of Congress.

In this matter the policy of Congress and the policy of the State are harmonious.

Central Pacific Sinking Fund Case, 99 U. S., 700, 727.

If it should be objected to the consolidation that it *destroys the right of the State given by the territorial charter to purchase the railroad* at the expiration of fifty years, one answer is found in Art. 11, Sec. 8 of the Constitution, by which says the Supreme Court, "the State as a State, is absolutely prohibited from engaging in any works of internal improvements."

Leavenworth County vs. Miller, 7 Kansas, 493.

THIS DILEMMA FOR THE STATE EXISTS, viz.: The Kansas Pacific from Kansas City to Denver is throughout a *Congressional* corporation, and so not

amenable to visitation and forfeiture by the State of Kansas or Colorado.

or,

If it is a *State* corporation in Kansas it is so only as to the part of its road within that State, and on the same principle it is a distinct State corporation as to that part of its road within the State of Colorado; and therefore the roads of these two companies were continuous and connected at the State line, and thus are within not only the policy, but letter, of the Kansas Railway Consolidation Act of March 1, 1870.

Laws Kansas, 1870, p. 195; reprinted.
Exhibit "K" to answer, at p. 18.

The objection of the State of Kansas to the consolidation, as shown by the petition and joint resolution directing this suit to be brought, is based upon the proposition that, whereas before the consolidation the Kansas Pacific Company was wholly a State corporation, it is since the consolidation (if that be valid) wholly withdrawn from State jurisdiction and control, and surrendered to the control of what it calls "a *foreign* government" meaning, I suppose, the government of the United States.

I have shown above (*ante* pp.) that as respects the road in question the Kansas Pacific was not wholly, if at all, a State corporation; at all events, that the State has waived all rights and powers inconsistent with the rights and powers conferred and duties enjoined and required by the Pacific Acts.

And this Court has decided that, assuming the consolidation to be valid, the consolidated company

cannot remove a cause into the Federal Court in any case where the Kansas Pacific could not have done so before the consolidation.

Myers vs. Kansas Pacific, 16 Fed. Rep., 292, S. C., 3 McCrary 578.

The Supreme Court has decided that its property is *taxable by the State* (Thompson vs. Pacific R. R., 9 Wall., 579), on precisely the same grounds that the property of the Union Pacific is taxable by the State of Nebraska (Railroad Co. vs. Peniston, 18 Wall., 5, 34).

We cannot, and the Court will not, anticipate questions which may arise out of the consolidation. It may be held that, so far as State power and jurisdiction are concerned, the consolidated company has as against the State no essential and substantial rights as respects the Kansas Pacific road and property, which the Kansas Pacific Company did not have before the consolidation.

If the consolidation is held valid, the State will be the last to concede that it is thereby deprived of any essential and substantial right or power.

THE LAWS OF COLORADO, it is conceived, have no bearing upon the controversy. But they are ample to permit consolidation, and the Constitution, Art. 15, Sec. 14, *infra*, prescribes the effects of a consolidation with a corporation of the United States.

See General Laws of Colorado, 1877, passed March 14, 1877. Power to consolidate is very general, p. 185, Sec. 315. And so to R. R. Cos., p. 187, Sec. 318: "Any railroad company may consolidate with any other road company."

Ib. § 318.

> Const. Colorado of 1876, Art. 15, Sec. 14, provides that if Colorado railroad corporations "shall *consolidate* by sale or otherwise with any railroad corporation of any other State or Territory, or of the *United States*, the same shall not thereby become a foreign corporation, but the Courts of this State shall retain jurisdiction over that part of the corporate property within the limits of this State in all matters which may arise, as if said consolidation had not taken place."

CONCLUSION. The power and duty of the company to operate and use the completed road, built as it was, with the assent of the State, under the provisions of the acts of Congress, come from those acts, and cannot be affected by any hostile action or legislation of the State; and this power and duty devolved on the consolidated company; and it is neither necessary nor, perhaps, proper to decide now the abstract and speculative question whether any purely State power except that of visitation and forfeiture is affected by the Acts of Congress relating to the Kansas Pacific, or by the consolidation of that company with others into the Union Pacific Railway Company.

The only point really in judgment is the *power given by Congress to consolidate*, and this power, in view of the prior and subsequent assent of the State, thereto, stands upon grounds peculiarly impregnable. This power may well be sustained without necessarily leading to the conclusion that the power of the National Government over the Kansas Pacific is, in all respects, *exclusive*. The general principles maintained in this argument only involve, of necessity, the conclusion that such power is and

must be *exclusive*, as respects the original power to construct, and the continuing right and duty to maintain, keep in repair and use, &c., &c., for all the purposes for which the road was constructed and aided by the General Government; as to which, being matters, expressly set down in the Acts of Congress, it is free from State power, on the ground, to use the language of Chief Justice MARSHALL in the case of the Bank of the United States, that "THE STATES HAVE NO POWER TO RETARD, IMPEDE, BURTHEN, OR IN ANY MANNER CONTROL, THE OPERATION OF CONSTITUTIONAL LAWS ENACTED BY CONGRESS TO CARRY INTO EXECUTION POWERS VESTED IN THE GENERAL GOVERNMENT."

Osborne vs. United States Bank, 9 Wheat., 738.
Cooley vs. Bd. of Wardens, 12 How., 299.
Gilman vs. Phila., 3 Wall., 713.
Crandall vs. Navada, 6 Wall., 35.
Farmers' Nat. Bank vs. Dearing, *supra*, p.

JOHN F. DILLON,
For the Defendant.

SIDNEY BARTLETT,
JOHN P. USHER,
A. L. WILLIAMS,
Of Counsel.

111-449

In the Supreme Court

OF THE

United States.

THE STATE OF KANSAS,
EX REL. W. A. JOHNSTON, AS ATTORNEY GENERAL,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

THE STATE OF KANSAS,
EX REL. W. A. JOHNSTON, AS ATTORNEY GENERAL,
vs.
F. L. AMES.

BRIEFS, POINTS, AND ARGUMENTS

IN ABOVE CAUSES, SUBMITTED ON BEHALF OF THE STATE OF KANSAS.

W. A. JOHNSTON,
Attorney General of Kansas.

C. A. SEWARD,
W. H. ROSSINGTON,
GEORGE S. GREEN,
A. A. HARRIS,
Of Counsel.

KANSAS PUBLISHING HOUSE, TOPEKA, KANSAS.

IN THE SUPREME COURT

OF THE UNITED STATES.

THE STATE OF KANSAS,
EX REL. W. A. JOHNSTON, AS ATTORNEY GENERAL,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

I.

THIS is a proceeding in the nature of *quo warranto*, brought in the name of the State by the Attorney General, upon his relation, against the Kansas Pacific Railway Company in the Supreme Court of the State of Kansas. The proceeding was not instituted by the Attorney General voluntarily, nor at the instance or request of any number of persons. The Attorney General did not, himself, seek or determine the tribunal before which the proceeding should be brought.

Sometime during the year 1880 the Kansas Pacific Railway Company entered into articles of consolidation with the Union Pacific Railroad Company and the Denver Pacific Railway Company, and openly declared that it was no longer amenable to the laws of the State of Kansas, or the jurisdiction of her tribunals. At the first meeting of the Legislature succeeding this act the following resolution was passed:

HOUSE CONCURRENT RESOLUTION NO. 21.

(Amendment to House Resolution No. 21, as recommended by the Committee.)

Whereas, The Kansas Pacific Railway Company, a railroad corporation created and organized under the laws of the Territory of Kansas, known at the time of its organization as the Leavenworth, Pawnee & Western, and subsequently as the Kansas Pacific, Eastern Division, and still later as the Union Pacific, Kansas Division, and the Union Pacific Railroad Company, created under the act of Congress, have heretofore attempted a consolidation, and pursuant to said attempted consolidation the Kansas Pacific Railway Company has ceased to do business as a railroad company, and the consolidated company, under the name of the Union Pacific Railroad Company, is now exercising all the franchises, privileges and immunities of the Kansas Pacific Railway Company, and has removed from the State all of its general offices, all of which acts are believed to be in disregard to the laws of the State of Kansas; and to the end that the law may be enforced—

Resolved by the House of Representatives, the Senate concurring therein:

First: That the Attorney General be directed to examine into the alleged consolidation of the Union Pacific Railroad Company with the Kansas Pacific Railway Company, and ascertain its terms and conditions, and state whether the consolidated company has been legally formed under the laws of this State, or any law paramount to the laws of this State.

Second: That he state whether in his opinion the consolidated company is amenable to the laws of this State; if so, to what extent, and in what particulars.

Third: That he state whether in his opinion the said Union Pacific Railroad Company has usurped rights and franchises, or is exercising corporate rights and franchises, in this State, not authorized by law, or has in any manner failed to comply with, or has violated any laws of this State; if so, in what respect.

Fourth: That he state whether in his opinion the Kansas Pacific Railway Company is in law an existing corporation of this State, or whether it has become an extinct corporation and the State has lost jurisdiction over the property once belonging to said corporation. If he state that it has lost such jurisdiction, he must state how and in what manner that end has been reached.

Fifth: That he state what remedies are left to the State in respect to each of the matters above referred to.

Sixth: That he also state what will be the probable expense to the State for counsel in case actions are instituted in the above matters by the State.

Seventh: That he make such report within a reasonable time, not to exceed three months from this date, and file the same with the Governor of the State, who shall transmit the same with his message to the next session of the Legislature. Nothing herein shall prevent the publication in the newspapers of the State of said report as soon as made.

In the interval between the session of the Legislature at which this resolution was passed, and its next session, the Attorney General made his report in conformity with the requirements of said resolution, and in pursuance of that report, which was transmitted by the Governor to the Legislature, the following resolution was passed:

HOUSE CONCURRENT RESOLUTION NO. 15,

In relation to instructing the Attorney General to commence proceedings in *quo warranto* in the Supreme Court of the State of Kansas against the Kansas Pacific Railway Company and the Union Pacific Railway Company.

Whereas, The Attorney General has reported to the Governor upon the subject-matter of House concurrent resolution No. 21, passed at the last session of the Legislature, that the attempted consolidation of the Kansas Pacific Railway Company, a corporation created by and existing under the laws of Kansas, with the Union Pacific Railroad Company, a corporation created by an act of Congress, was, in his opinion, without the authority or consent of the State; that the State of Kansas had never directly assented to said consolidation; that the policy of the State, as shown by various legislative acts and concurrent resolutions, had always been to hold and retain control of said corporation; that the State has by two several statutes passed prior to the attempted consolidation, directly and explicitly forbidden such consolidation to be made; that the State of Kansas has rights in reversion which she has never abrogated or renounced, and which said consolidation would defeat; and

Whereas, Said Kansas Pacific Railway Company has ceased to do business in this State, and the consolidated company, under the name of the Union Pacific Railway Company, is now exercising all the franchises and privileges of the Kansas Pacific Railway Company, and has removed from the State all its general offices—all of which acts are believed to be in disregard to the laws of the State of Kansas; and to the end that the law may be enforced: therefore,

Be it resolved by the House of Representatives, the Senate concurring therein:

That the Attorney General is hereby directed and required to institute proper proceedings in the Supreme Court of the State of Kansas, in the nature of *quo warranto*, against the Kansas Pacific Railway Company, for an abandonment, relinquishment and surrender of its powers and duties as a corporation to such consolidated company, and also to institute like proceedings against the said consolidated company, the Union Pacific Railway Company, for usurping, seizing, holding, possessing and using the franchise and privileges, powers and immunities of the Kansas Pacific Railway Company in the State of Kansas; and that he shall prosecute without unnecessary delay such action or actions to final judgment.

Resolved, That the Governor and Attorney General be and they are hereby authorized to employ associate counsel to assist the Attorney Gen-

eral in the prosecution of such case or cases, they to have power to agree upon the amount to be paid such associate counsel for their fees and expenses.

In compliance with this direction of the Legislature of the State of Kansas, this proceeding was brought in the Supreme Court of the State of Kansas. To this proceeding a voluntary appearance was made, and an answer filed at the sitting of the court in November last; and at once, and upon the filing of the answer, there was presented to the court and filed the following motion to have the Government Directors of the Union Pacific Railroad Company made parties:

IN THE SUPREME COURT, STATE OF KANSAS.

The State of Kansas, *ex rel.* W. A. Johnston, as Attorney General, Plaintiff, *vs.* The Kansas Pacific Railway Company, Defendant.	No. 2969.
The State of Kansas, *ex rel.* W. A. Johnston, as Attorney General, Plaintiff, *vs.* F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the Board of Directors of the Union Pacific Railway Company, Defendants.	No. 2970.

Now come George G. Haven, Isaac H. Bromley, Watson Parrish, Arthur L. Conger, and Colgate Hoyt, by Wager Swayne, their attorney, and respectfully show unto the court:

1. There is now pending in this honorable court a civil action entitled "The State of Kansas, *ex rel.* W. A. Johnston, as Attorney General, plaintiff, *vs.* The Kansas Pacific Railway Company, defendant," for the purpose of declaring forfeited the charter of the Kansas Pacific Railway Company, for various reasons therein stated, which petition filed by the Attorney General in said cause, your petitioners pray may be considered as part of this petition, and a copy of the same is herewith shown as part of this their petition.

2. There is also pending in this honorable court a civil action above entitled, instituted by the State of Kansas, on the relation of its Attorney General, against F. L. Ames and the other persons therein named, who are therein alleged to call themselves the Board of Directors of the Union Pacific Railway Company. The said petition alleges that the said Ames and the other persons therein named, calling themselves the Board of Directors of the Union Pacific Railway Company, do now, and have since January 24, 1880, used and still do use without any warrant, charter or grant, the following liberties, privileges and franchises, viz.: that of being a railroad company, to use, operate and enjoy, and to receive the tolls, issues, profits and benefits derived from the operation and use of the Kansas Pacific Railroad, being a line of railroad beginning at Leavenworth, in the State of Kansas, and extending in a general westerly direction, by

the way of the Fort Riley military reservation, to the city of Denver in Colorado, and beginning at the State line of Kansas, at a point near the junction of the Missouri and Kansas rivers, and running west to a junction with said line, at a point near the city of Lawrence, Kansas; which said liberties, privileges and franchises, it is therein alleged, the said defendants, calling themselves the Board of Directors of the Union Pacific Railway Company, during all the time aforesaid, have usurped and still do usurp upon the said State, to her great damage and prejudice.

3. The said Haven states that he is, and was at the time of the commencement of these actions, a citizen of the State of New York; the said Hoyt states that he is, and was at the time of the commencement of these actions, a citizen of the State of New York; the said Bromley states that he is, and was at the time of the commencement of these actions, a citizen of the State of Connecticut; the said Parrish states that he is, and was at the time of the commencement of these actions, a citizen of the State of Nebraska; and the said Conger states that he is, and was at the time of the commencement of these actions, a citizen of the State of Ohio.

4. That the said Kansas Pacific Railway Company has filed an answer in this honorable court to the petition in the said cause.

5. That in the said suit of the State of Kansas, on the relation of its Attorney General, against the said Ames and others, calling themselves the Board of Directors of the Pacific Railway Company, the said defendants have filed an answer in this cause.

6. Your petitioners say that the object of the said suit against the Kansas Pacific Railway Company is to have a judgment that the said Kansas Pacific Railway Company has forfeited all its rights, liberties, and franchises, and that it be ousted from the same, and that the said corporation be thereupon dissolved.

7. Your petitioners say that the object of the suit against the said Ames and the other persons specified in the petition in the said cause, is to have a judgment that the said Ames and others, constituting the members of the Board of Directors of the Union Pacific Railway Company, appointed and elected by the stockholders thereof, have no right, liberty, privilege, or franchise to operate and use the road originally built by the Kansas Pacific Railway Company, and that they be ousted from the use, enjoyment and exercise of the right, liberty, privilege or franchises of using and operating the same.

8. Your petitioners state that it is untruly alleged in the said petition of the State of Kansas, on the relation of its Attorney General, against the said Ames and others named therein, that they do call themselves and are the Board of Directors of the Union Pacific Railway Company, and as such claim to have, use and enjoy the liberty, privilege and franchise in the said petition mentioned. On the contrary thereof, your petitioners give the court to see and understand and be informed that the said Ames and the other persons specified in the said petition of the State of Kansas, are and claim to be only *part* of the Board of Directors of the Union Pacific Railway Company; that the said Ames, and the other persons specified

therein, are those members of the Board of Directors of the Union Pacific Railway Company who are elected by the stockholders. Your petitioners state that in addition to the said Directors thus elected and appointed by the company, the acts of Congress (act of July 2, 1864, section 13) provide that the President shall appoint five additional Directors, who shall not be stockholders, (act of July 1, 1862, section 1,) and that at least one of said Government Directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The act of 1864, section 13, prescribes the duties of said Government Directors. Each of the petitioners states that he has been appointed conformably to the said act by the President of the United States, a Government Director in the Union Pacific Railway Company, and has duly qualified, and is now acting as such in conjunction with the persons named in the answer of the said Ames and others filed herein, and that together with such other persons, your petitioners constitute the Board of Directors of the Union Pacific Railway Company.

Your petitioners state that the acts of Congress of the United States applicable to the Union Pacific Railway Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company, authorize said companies to consolidate; and that the said companies claim to have so consolidated in strict conformity with the said acts of Congress and of law, on or about the 24th day of January, 1880, as is more fully set forth in the answers of the Kansas Pacific Railway Company, and of the said Ames, and others, filed respectively in the causes aforesaid.

Your petitioners state that they are specially appointed to protect the interests of the United States in respect of the said consolidated company, including the railroad and properties which the said consolidated company acquired from the said Kansas Pacific Railway Company. That the said Kansas Pacific Railway Company is indebted for subsidy bonds received from the United States and under the provisions of the said acts of Congress, in a sum now amounting with interest to more than twelve million ($12,000,000) dollars, and which at the time said debt will mature, will amount to a very much larger sum. That this debt is a second lien on the road of the said Kansas Pacific Railway Company, in aid of which the said subsidy bonds were granted. That it is the duty of the said consolidated company to discharge all of the obligations and to perform all the duties of the said Kansas Pacific Railway Company under the said acts of Congress toward the United States, and to pay the said subsidy bonds at maturity, and to keep said railroad in repair, and to use the same for the purpose of transporting at all times, mails, troops, munitions of war, supplies and public stores, whenever required to do so by any department of the Government; and to apply toward the said subsidy bonds, until the said bonds and interest are paid, at least five per centum of the net earnings of the said road to the payment thereof; and likewise to apply to the said debt during and for the whole period during which it

shall remain unpaid, one-half of the compensation of all services rendered to the Government by the said company.

9. Your petitioners state that if the judgment of forfeiture and dissolution sought in the cause against the Kansas Pacific Railway is rendered as asked, and if the judgment in the cause against Ames and others shall be rendered as sought, the effect, as your petitioners are advised and fear, may or will be to extinguish the debtor to the United States in respect of the said subsidy bonds and interest, and to disable alike the Kansas Pacific Railway Company and the Union Pacific Railway Company from performing the aforesaid duties enjoined and required by the said acts of Congress toward the Government of the United States and the public, and deprive the Government of the benefit and advantage thereof, and prevent the application of five per cent. of the net earnings of the road and one-half of the amount received for Government service, to the payment thereof.

Your petitioners aver that, by reason of the premises, they are necessary parties to the said proceedings in each of the causes above referred to; and they therefore pray that an order may be made in each of the above causes, making them parties to each of the said actions, and that they be permitted forthwith to file their answers therein for the protection of the interests of the United States in the premises, and to maintain their rights, franchises, and liberties, as the Government Directors of the said Union Pacific Railway Company.

G. G. HAVEN.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

George G. Haven, being duly sworn, says: That he is one of the petitioners in the foregoing petition, and is the chairman of the Government Directors of the Union Pacific Railway Company. He knows the contents of the petition, and that the facts therein stated are true, as he advisedly and verily believes.

Sworn and subscribed before me, this 27th day of October, 1883.

Witness my hand and seal notarial, the day and year above written.

[Seal.]

WM. J. HARDING,
Notary Public, Kings County, New York.
(Certificate filed in New York county.)

Which motion the court, upon consideration and after argument, overruled, as to the case of the Kansas Pacific Railroad, as shown by the following order:

THE STATE OF KANSAS—IN THE SUPREME COURT.

The State of Kansas, *ex rel.*, Plaintiff,
vs.
Kansas Pacific Railway Co., Defendant. } No. 2969.

And now, on this 7th day of November, 1883, this cause came on to be heard, on the written application heretofore filed by Geo. G. Haven, for himself, Isaac H. Bromley, Colgate Hoyt, A. L. Conger and Watson Parrish, for an order to be made by this court in this cause making them

parties defendant in said cause, and that they be permitted forthwith to file their answer therein as Government Directors, so called, of the Union Pacific Railway Company. J. P. Usher and A. L. Williams appeared for said motion, and W. A. Johnston, Geo. S. Green, A. A. Harris and W. H. Rossington appeared for the plaintiff. The said motion was argued by counsel, and on consideration it was by the court overruled; to which ruling of the court the petitioners except.

The counsel for defendant, who also appeared for the Government Directors and the Union Pacific Railroad Company, then filed petitions and bonds for removal into the Circuit Court of the United States for the District of Kansas. The Attorney General, on behalf of the State, resisted the removal before the Supreme Court, and argued from the record that no grounds of removal existed. The Supreme Court, however, made no affirmative order in the case, but did give the Attorney General leave to plead within thirty days, in the following order:

THE STATE OF KANSAS—IN THE SUPREME COURT.

The State of Kansas, *ex rel.*, Plaintiff,
vs.
Kansas Pacific Railway Co., Defendant. } No. 2969.

And now, to wit, on this 7th day of November, 1883, the petition of the respondent, to remove this cause to the United States Circuit Court for the District of Kansas, came on to be heard. The plaintiff appeared by W. A. Johnston, Attorney General, and W. H. Rossington, A. A. Harris and Geo. S. Green, its attorneys. The respondent appeared by J. P. Usher and A. L. Williams, its attorneys, which said application was argued by counsel and considered by the court; and the court finds that the sureties upon the bond for removal filed in this cause, are sufficient.

Thereupon, the application of the plaintiff to plead to the answer of the respondent filed in this case, within thirty days from the date hereof, came on to be heard, and the same was by the court granted, and the above cause is continued until the January, A. D. 1884, session of this court.

Thereby substantially asserting that in the opinion of the Supreme Court the case of the State on the relation of the Attorney General against the Kansas Pacific Railway Company was not removable under the acts of Congress, by virtue of which, removal was sought to be had. At the next ensuing term of the United States Circuit Court, on the fourth Monday of November, 1883, counsel for defend-

ant filed a transcript of the record of this case in that court. Thereupon the Attorney General moved to remand, which motion was by the Circuit Court sustained.

The defendant comes here by writ of error under the thirty-second rule of this court.

The petition in this case alleges the incorporation of the Leavenworth, Pawnee & Western Railroad Company under an act of the Legislature of the Territory of Kansas, passed at its session in the year 1855. For convenience, we here insert this act in full, together with a supplementary act passed in 1857, by the Legislature of the Territory of Kansas, which also is alleged in our petition to be a part of the act of incorporation of this company.

[LAWS OF 1855, P. 915.]

AN ACT to incorporate the Leavenworth, Pawnee & Western Railroad Company.

Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas, as follows:

SECTION 1. A company is hereby incorporated, called the Leavenworth, Pawnee & Western Railroad Company, the capital stock of which shall be five millions of dollars, to be divided into shares of fifty dollars each; the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make and use a common seal and change and alter the same at pleasure, and shall be able in law and equity to make contracts; may take, hold, use, possess and enjoy the fee simple or other title in and to any real estate, necessary to carry out the provisions of this act, and no more, and may sell, convey, pledge, mortgage or dispose of the same; may make by-laws, rules and regulations proper and necessary for carrying into effect the provisions of this act, not repugnant to the constitution or laws of the United States or of this Territory, and shall have the usual and necessary powers of companies for such purposes.

SEC. 2. W. H. Russell, J. Marion Alexander, S. D. Lecompte, Amos Rees, James Davies, W. F. Dyer, Robert Wilson, James Findlay, E. S. Wilhoit, Edward H. Dennis, C. H. Grover, Wilburn Christison, M. P. Rively, Charles Hayes, and Cornelius M. Burgess, or any five of them, shall constitute the first board of directors under this act, and shall hold their office until their successors shall be qualified; they shall, within five years from the date of the passage of this act, meet at such time and place as shall be designated by any three of them, and organize as a board of directors; and when organized, they shall cause books to be opened for sub-

scription to the capital stock of the said company, at such time and place as they may designate, under the supervision of such persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such books when necessary until the whole stock shall be subscribed.

SEC. 3. So soon as three thousand shares shall be subscribed, the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in two or more public newspapers.

SEC. 4. An election for nine directors shall be held on the first Monday in April in each year, and, if not held on that day, an election may be held at any other time that the directors shall designate; the election shall be held under the supervision of three or more stockholders, and the persons receiving the highest number of votes shall be elected, and shall continue in office until their successors be qualified; every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy; soon after the election, the directors shall meet and elect one of their number as president, who shall hold his office for the term for which he was elected director, and until his successor shall be qualified.

SEC. 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company, and shall keep a journal of their proceedings, and shall cause correct books and accounts to be kept; they may determine by law what number of directors shall constitute a quorum, may appoint committees, and fill all vacancies in any office under said company; they shall fix the salaries of the president, and the officers and agents; they may take security of their officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

SEC. 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper, and if any stockholder shall fail to pay any such requisitions within ten days after the time appointed, the said company shall recover the same with interest, and if not collected may direct the stock forfeited, and sell the same; and no delinquent stockholder shall vote in said company.

SEC. 7. Said company shall have full power to survey, work, locate, and construct a railroad from the west bank of the Missouri river, in the town of Leavenworth, in this Territory; and from thence west to the town of Pawnee, or to some point feasible, and near to the Government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the Territory, and for that purpose may hold a strip of land, not exceeding one hundred feet in width, with as many set of tracks as the said president and directors may deem necessary: *Provided*, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses and water stations, and may extend branch railroads to any point in any of the counties through which the said road may

be located; and said company shall have power to construct a branch road from any point in the main trunk of said road to the town of Kickapoo, on the Missouri river; no discrimination shall be made between the main trunk of said railroad and the branches connecting with the same, in regard to the rates of passage and the charges for freight shipped over the same.

SEC. 8. Said company shall take voluntary relinquishments of the right of way for said road, and the necessary depots and water stations; and if the land through which said road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minors shall have power to convey to said company so much of the land as may be necessary for the purposes aforesaid, on fair and equitable terms, but every such relinquishment shall be subject to the approval or rejection of the Probate or other Court in which such guardianship is pending. If any owner of any tract of land through which said railroad shall pass, shall refuse to relinquish his right of way for said railroad to said company, or the necessary land for depots, engine or wood houses, water station, stopping stages, or turnouts, or if the owners be infants, or persons of unsound mind, or non-residents of the Territory, the facts of the case shall be especially stated to the Judge of the District Court of the county, or presiding Judge of the Court of Common Pleas of the county, as the case may be, in which such lands are situated, and said Judge shall appoint three disinterested citizens of the county in which said lands are situated to view said lands, who shall take into consideration the value of the land, and the advantages and disadvantages of the road to the same, and shall report, under oath, what damages will be due to said lands or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned; notice of such application to such Judge shall be given to the owner of such land five days before the making of the application, if such owner reside in this Territory, or to his guardian; and if such owner be a non-resident of this Territory, he may be served with actual notice, or by an advertisement for four weeks in some public newspaper.

SEC. 9. The persons appointed to view and value such lands shall file their report and plat in the office of the Clerk of the District Court or Court of Common Pleas, as the case may be, of the county in which the land or a part thereof is situated; and if no valid objections be made to said report, the court shall enter judgment in favor of such owner against such company, for the amount of damages assessed, and shall make an order vesting in said company, in fee simple, title of the land in such plat and report described. Objections to such report must be filed within ten days; after the same shall have been filed, said objections shall be examined by said judge, in term-time or vacation, and he may hear testimony, and by judgment confirm said report, or he may set the same aside, and appoint three other viewers, who shall proceed in the same manner, and make a report, until a report is confirmed: *Provided*, In order that the progress of the work may not be impeded, that after said owners have filed their report and plat in the office aforesaid, the company, after having

made a tender of the amount of damages to the person or persons entitled to the same, or made a deposit of the amount with the clerk of the court in which the case may be pending, shall be authorized to proceed in the construction of the work as fully as though no disagree ment had arisen. In all such cases the court shall adjudge the costs of the proceedings according to equity, and the court shall have power to make such orders and take such other steps as will promote the ends of justice between the owners of such lands and the said company; and the said viewers shall be entitled to the same fees as are allowed to commissioners in partition under the statute.

SEC. 10. Said company may build said road along or across any public road, or street, or wall of any town or city, and over any stream or highway; but whenever said road shall cross any public road, said company shall keep good and sufficient cause-ways, or other adequate facilities for crossing the same; and said road shall not be so constructed as to prevent the public from using any road, street or highway, along or across which it may pass; and when said railroad shall be built across any navigable stream, said company shall erect a bridge sufficiently high on which to cross, or shall construct a drawbridge, so that in no case shall the free navigation of such stream be obstructed. When any person shall own lands on both sides of said road, said company, when required so to do, shall make and keep in good repair one causeway, or other adequate means of crossing the same.

SEC. 11. Said company shall commence the construction of said road within five years, and shall complete the same within twelve years thereafter; and said company shall have general power to use, manage, control, and enjoy said road; shall determine what kind of carriages shall be used thereon, and by whom, or in what manner; and shall determine the terms, condition and manner in which merchandise, property and passengers shall be transported; and shall have power to construct and keep such turn-outs, gates, culverts, toll-houses, depots, warehouses, causeways, and other buildings, machinery and fixtures, as may be necessary. Said company may receive such tolls and freights as may be determined upon by the directors, and shall keep posted up in their depots estimates of the rates of tolls and freight charged.

SEC. 12. Dividends of so much of the profits of said company as shall appear advisable to the directors shall be dec lared semi-annually, and be paid to the stockholders or their legal representatives, on application at the office of said company, at any time after the expiration of ten days from the time of declaring the same; but the dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby; and if the said directors shall make any dividend which shall impair the capital stock of the company, the directors consenting thereto shall be liable in their individual capacities, to the company for the amount of capital stock so divided; and each director present when such dividend shall be declared, shall be considered as consenting thereto, unless he immediately enter his

protest on the minutes of the board, and give public notice to the stockholders of the declaring of such dividends.

SEC. 13. At every annual meeting of said company the directors shall make to the stockholders an exhibit of the affairs and condition of the company; one-tenth part in interest of all the stockholders may call a meeting, by giving four weeks' notice in two public newspapers.

SEC. 14. When said road shall be completed, the company shall file a plat thereof in the office of the Secretary of the Territory, or of the State or States, as the case may be, and the Legislature may at any time require a statement from the company as to the progress of the work, the amount of business, and the receipts of the company; and the books and accounts of said company may at any time be investigated by a committee appointed by the General Assembly; and the said corporation shall make an annual report to the Secretary of the Territory, or of the State or States, as the case may be, of the operations of the year ending on the first day of December, which report shall be verified by the oaths of the treasurer and acting superintendent of operations, and filed in the office of the Secretary of the Territory, or of the State or States, as the case may be, by the third Monday in December, in each year, and shall state: *first*, the capital stock and the amount actually paid in; *second*, the amount expended for the purchase of land for the construction of the road, for buildings, and for engines and cars, respectively; *third*, the amount and nature of its indebtedness, and the amount due the corporation; *fourth*, the amount received for the transportation of passengers, of mails, of property, and from all other sources; *fifth*, the amount of freight, (specifying the quantity in tons,) of the products of the forest, of animals, of vegetable food, other agricultural products, manufactures, merchandise, and other articles; *sixth*, the amount paid out for repairs; *seventh*, the number and amount of dividens, and when made; *eighth*, the number of engine houses and shops, of engines and cars, and their character; *ninth*, the number of miles run by passenger, freight and other trains, respectively; *tenth*, the number of men employed, and their occupations; *eleventh*, the number of persons injured, in life or limb, and the cause of such injuries; *twelfth*, whether any accidents have arisen from carelessness or negligence of any person in the employment of the corporation, and whether such person is retained in the service of the corporation.

SEC. 15. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any incorporated city, town, or incorporated company may subscribe to the stock of said company, and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of such city, town, or corporation.

SEC. 16. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State or States through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued by persons to be mutually chosen by the State and by said company; but two years' notice shall be given to said company of the intention of the State to purchase said railroad.

SEC. 17. When any person ceases to be a stockholder, he shall cease to be a member of said company.

SEC. 18. If any person shall willfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixtures or improvement belonging to said company, he shall be considered guilty of a criminal offense, and shall be punished in such manner as shall be prescribed by law; and shall also be liable to said company for all damages by it sustained.

SEC. 19. The operations of said company shall be confined to the general business of locating, constructing, making and using said railroad, and the acts necessary or proper to carry the same into complete and successful operation.

SEC. 20. The stock of said company shall be considered personal property, and shall be assignable and transferable according to such rules and restrictions as the board of directors shall, from time to time, make and establish, subject, however, to the laws of the Territory, or any future State erected out of this Territory, as the same may be made. In case that it shall happen at any time, that an election of directors shall not be made on any day when, pursuant to this act or any regulations of said company, it ought to have been made, the said corporation shall not for that cause be deemed dissolved; but it shall and may be lawful on any other day, to make and hold an election of directors in such manner as shall be regulated by the by-laws and ordinances of the company.

SEC. 21. Said company shall have power to receive and hold loans, gifts grants, and donations of land, money, or bonds, in any quantity, from this Territory, or from any future State erected out of this Territory, or the United States; and may sell, convey, pledge, mortgage, or otherwise dispose of said land, moneys, or bonds, or any part thereof, and apply the proceeds of the same to the construction of said railroad.

This act to take effect and be in force from and after its passage.

In the year 1857, at a session of the Legislature of the Territory of Kansas, another and supplementary private act was passed, entitled "An act supplemental to an act entitled 'An act to incorporate the Leavenworth, Pawnee & Western Railroad Company,'" which said act reads and appears as follows:

[PRIVATE LAWS OF KANSAS TERRITORY, 1857, PAGE 218.]

AN ACT supplemental to an act entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company."

Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas, as follows:

SECTION 1. The provisions of an act entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company," shall be and the same are hereby so extended as to enable said company to commence and progress with, at any time within nine years from the date of the passage of this act, the construction of a railroad, to be called the "Southern Branch & Gulf Railroad," beginning at some favorable point on the Leavenworth, Pawnee & Western Railroad, and following the most practicable route southwardly, to terminate on the southern boundary of the Territory of Kansas, at some point where an easy connection may be had with a line of railroad extending through the Indian Territory and State of Texas to the Gulf of Mexico, under the same provisions, privileges, rights and restrictions as provided in the act to which this act is a supplement; and for said purpose the said company may increase their capital stock to ten millions of dollars, or any other amount necessary for the completion of the said road.

SEC. 2. The said company shall have, hold and enjoy the free right and privilege of keeping and maintaining a public ferry across the Missouri river, at the point or terminus of said road on said river; and also across other streams on the line of said road, where the said company may deem such ferry preferable to a bridge, or until such time as said company can procure bridges.

SEC. 3. The said company shall have power and authority at any time within nine years from the passage of this act, to commence and continue the construction of a branch or branches of said road from any point on said road to any point on the southern or western boundary of the Territory; and also to construct a branch from any point on the said road to any point on the northern boundary of the Territory of Kansas, with all the privileges, powers and rights granted to said company by the act to which this is a supplement, and subject to all the restrictions and provisions of said act.

This act to take effect and be in force from and after its passage.

Approved February 23, 1857.

The petition further alleges, that in the month of January, 1857, at the city of Leavenworth, this company was duly organized by the subscription to its stock, by the election of directors and other officers, by a subscription of additional stock within the limits of its charter, by the election from time to time of new directors and officers. And it is further alleged, that the company was kept in constant and efficient existence; that the construction of the road was commenced

in May, 1857, and the main line of the road located from Leavenworth to Fort Riley; that in November, 1861, final estimates and adjustments of the line were commenced and continued, to determine its cost from Leavenworth to Fort Riley; the right of way and depot grounds for a large part of said line were, before the 1st day of January, 1862, duly obtained; that the rights of way were established by treaty through the Delaware and Pottawatomie Indian reservations.

The petition further alleges, that, after the organization of said company and the commencement of its operations, it was, by the acts of Congress of 1862 and 1864 known as "Pacific railroad acts," authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one-hundredth meridian of longitude west from Greenwich, upon the same terms and conditions as are provided in the act for the construction of a railroad and telegraph line of the Union Pacific Railroad Company, and to meet and connect with the Union Pacific Railroad Company's line at the one-hundredth meridian. And that in pursuance of this permission, and upon certain conditions named in the act not inconsistent with the provisions of the charter of the Leavenworth, Pawnee & Western Railroad Company, the bonds of the Leavenworth, Pawnee & Western Railroad Company were guaranteed by the United States to the amount of sixteen thousand dollars per mile from the Missouri river to a point called Sheridan, on the projected line of the road.

The petition then alleges a change of name of the corporation to the Union Pacific Railroad Company, Eastern Division, and afterwards to the Kansas Pacific Railway Company, and the construction of its said railroad under the terms of

the charter hereinbefore printed, from Leavenworth, by way of the Fort Riley military reservation, towards the summit of the Rocky Mountains; and a railroad from a point at or near Wyandotte, at the junction of the Missouri and Kansas rivers, to a connection with the main line at or near the city of Lawrence in the State of Kansas, and thereupon continuously operated and controlled the railroad, and enjoyed the liberties, privileges and franchises thereof up to the 24th of January, 1880, under and by virtue of the charter of 1855, and the supplementary act amending the same as hereinbefore recited.

The petition further states, that on the 24th day of January, 1880, the Kansas Pacific Railway Company wrongfully and unlawfully attempted to consolidate its said corporation with the Union Pacific Railroad Company, a corporation chartered under the acts of Congress of 1862 and 1864, and the Denver Pacific Railway & Telegraph Company, and to confer upon the consolidated company all of the franchises, immunities and privileges granted by the charter of 1855 and its amendments, and merged the same into a pretended corporation not created by the laws of the Territory or State of Kansas, nor owing any duty to the Territory or State of Kansas, to wit: the consolidated company known as the Union Pacific Railway Company.

The petition further alleges, that it wrongfully and unlawfully entered into articles of consolidation with the Union Pacific Railroad Company and the Denver Pacific Railroad & Telegraph Company, which were expressly in violation of its charter, and in conflict with the duties and obligations owing by it to the State of Kansas, under the provisions and terms of the acts of 1855 and 1857 and the laws of the State of Kansas which constitute its charter. And further, that these articles of consolidation are in conflict with the laws of

the State of Kansas respecting railroad corporations and the right of railroad corporations to consolidate, and were not compatible with said laws.

For convenience, we here insert a copy of the articles of union and consolidation:

ARTICLES OF UNION AND CONSOLIDATION

Between the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, forming the Union Pacific Railway Company.

Whereas the Union Pacific Railroad Company, a corporation duly organized and existing under the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the act of Congress of July 2, 1864, and various other acts amendatory of the foregoing, owns a line of railroad and telegraph extending from the Missouri river to Ogden, in the Territory of Utah, a distance of 1,042 miles;

And whereas the Kansas Pacific Railway Company, described in the said act of Congress of July 1, 1862, as the Leavenworth, Pawnee & Western Railroad Company, the name whereof was afterward changed to that of the Union Pacific Railway Company, Eastern Division, and again subsequently changed to the Kansas Pacific Railway Company, is a corporation which is entitled to participate in the benefits of the said act of Congress of July 1, 1862, and of July 2, 1864, and the various acts amendatory thereof and relating thereto;

And whereas the said Kansas Pacific Railway Company owns and operates, as a branch of the Union Pacific Railroad, a railroad and telegraph line from a point connecting with the Missouri Pacific Railroad in Kansas City, in Missouri, thence from the Missouri river, at the mouth of the Kansas river, on the south side thereof, with a spur from Wyandotte, in the State of Kansas, being from the east State line of Kansas to Denver, 639 miles in length, with a branch from a point on the main line near Lawrence to Leavenworth, 34 miles in length, in said State of Kansas, connecting at Denver with the Denver Pacific Railway, and is entitled to extend said railroad to the western boundary of the former Territory of Kansas, to locate and construct branches of said railroad in the counties of the former Territory of Kansas, adjacent to the line of said railroad, as then located and defined by law;

And whereas the Denver Pacific Railway and Telegraph Company, under and by virtue of the said acts of Congress, and of an act of Congress approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of connection with the Union Pacific Railroad, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado;" and of an act of Congress approved June 20, 1874, which, among other

things, enacts that for all the purposes of the said act of July 1, 1862, and of the acts amendatory thereof, "The Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3, 1869," whereby and by force whereof the said Denver Pacific Railway and Telegraph Company is likewise entitled to participate in the benefits of the aforementioned acts of Congress of July 1, 1862, and July 2, 1864, and the various acts amendatory thereof and supplemental thereto and relating to the Pacific system of railroads; all of which, whether particularly herein described or not, are, for greater certainty in this behalf, referred to and made part hereof;

And whereas the said Denver Pacific Railway and Telegraph Company owns a line of road one hundred and six miles in length, extending from Denver, where it connects with the said Kansas Pacific Railway, to Cheyenne, where it connects with the Union Pacific Railroad;

And whereas in the aforesaid legislation of Congress applicable to the above-mentioned three railroad companies it is provided that they may unite and consolidate their respective organizations;

And whereas each of said above-mentioned three companies, by corporate action duly and severally had, have resolved, pursuant to the authority in that behalf vested in them by law, to unite and consolidate their respective organizations into one company, and have severally agreed to and with each other upon the terms of such union and consolidation, being the terms herein embodied and expressed:

Now this agreement of union and consolidation, made this the 24th day of January, A. D. 1880, between the said Union Pacific Railroad Company, party of the first part, the said Kansas Pacific Railway Company, party of the second part, and the said Denver Pacific Railway and Telegraph Company, party of the third part, witnesseth:

That the said parties have respectively agreed and do hereby severally agree to and with each other upon the following articles of union and consolidation of their respective organizations into one company, viz.:

ARTICLE I. The said Union Pacific Railroad Company, the said Kansas Pacific Railway Company, and the said Denver Pacific Railway and Telegraph Company, in consideration of the premises, do hereby severally agree to and with each other to unite and consolidate, and do hereby unite, form, and consolidate their respective organizations, properties, and companies into one consolidated company, which shall succeed to, possess, and be entitled to receive from the Government of the United States all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which the aforesaid three companies, respectively, at the date of this consolidation, are or may be entitled or subject to under the acts of Congress in that behalf, in place and substitution of said constituent companies so consolidated, respectively; and the said consolidated company assumes to and for itself all of the provisions of said acts of Con-

gress, so far as applicable, relating or in any manner appertaining to said constituent companies, or either of them, including the power to sue and be sued in all courts of law and equity within the United States, whether Federal or State, and the right of corporations organized under a law of the United States to remove causes from State to Federal courts; and all of the provisions of the aforementioned acts of Congress and each of them, so far as in their nature applicable to the company hereby formed, shall apply thereto; it being the intent of the parties hereto and of these articles of union and consolidation to organize the company hereby formed under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company as fully as if the same were incorporated herein at large.

ART. II. The name of the said consolidated company hereby formed shall be "The Union Pacific Railway Company."

ART. III. The capital stock of the said Union Pacific Railway Company shall be fifty millions seven hundred and sixty-two thousand three hundred ($50,762,300) dollars, (being the total aggregate amount of the outstanding stock of the three constituent companies,) which shall be divided into shares of one hundred dollars each; and it shall be issued in lieu of the stock of the said constituent companies, on the surrender thereof for that purpose by the respective holders thereof. Every stockholder in the Denver Pacific Railway and Telegraph Company and in the Union Pacific Railroad Company shall receive in place of every share of one hundred dollars surrendered a share of one hundred dollars in the new company; and every stockholder in the Kansas Pacific Railway Company, the shares in which are only fifty ($50) dollars each, shall receive in place of every two shares of the stock at the time held by such stockholder in such company a share of the capital stock of the new corporation, upon surrendering to the new corporation the certificates of stock held by such stockholder.

ART. IV. The said new corporation shall, without unnecessary delay, issue certificates of stock, in such form as may by the board of directors be deemed advisable; and such board shall provide and adopt such rules and regulations as may be necessary and proper for the issuing and transfer of shares of stock of the said new corporation.

ART. V. The directors of the said Union Pacific Railway Company, to be elected by the stockholders at the annual meeting herein provided for, shall be fifteen in number, each of whom must be the *bona fide* owner of at least fifty shares of stock in the consolidated company. Such directors shall be chosen annually by a majority of the votes of the stockholders voting in person or by proxy at such election. And they shall continue to be directors until others are elected and qualified in their places. No person shall be a director unless he shall be qualified to vote for directors at the election at which he shall be chosen; and vacancies in the board of directors may be filled by the remaining directors at any regular meeting of the board. The directors of the said company shall annually, as soon

as may be after their election, elect from their own number a president and vice president, and shall also elect a treasurer and secretary.

ART. VI. The following-named persons shall be the first directors of said corporation, viz.: Fred. L. Ames, Ezra H. Baker, Elisha Atkins, F. Gordon Dexter, Sidney Dillon, Russell Sage, Jay Gould, Solon Humphreys, David Dows, William L. Scott, Silas H. H. Clark, Thomas T. Eckert, John Sharp, Grenville M. Dodge, Carlos S. Greeley. The following-named persons shall be the first officers of the said corporation, viz.: President, Sidney Dillon; Vice-President, Elisha Atkins; Treasurer and Secretary, Henry McFarland. The said directors and officers shall continue in office until their successors are chosen, as provided in these articles.

ART. VII. Until otherwise duly provided, the annual meetings of the stockholders of the Union Pacific Railway Company shall be held at the company's office in the city of New York, on the first Wednesday following the fourth day of March in each year, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day. Notice of such meeting shall be given as may be prescribed by the by-laws. These provisions may be changed by the stockholders of the consolidated company at any annual meeting of the said stockholders.

ART. VIII. The parties hereto of the first, and second, and third parts hereby assign, transfer, set over, and convey unto the said Union Pacific Railway Company, the consolidated corporation hereby formed, all the rights, privileges, exemptions, and franchises of each of said companies, parties hereto, and all the property, real, personal and mixed, and all choses in action, debts on whatever account of, owing or belonging to either of said companies, and all claims, demands, property, rights of way, leases, leasehold interests, branches, iron rails, rolling stock, tools and implements, and property of every description, name, and nature belonging to either of the said companies, with the appurtenances, to be held, owned and controlled by the said consolidated corporation, its successors and assigns, as fully and completely, to all intents and purposes, as the respective parties thereto do or can now own, hold, use, enjoy, or control the same; and the parties hereto agree to execute and deliver to said consolidated corporation instruments of transfer, or assignments, or other instruments proper or necessary to carry out the covenants, conditions and provisions of this agreement. This assignment, transfer, sale and conveyance is made to the said consolidated corporation subject to all liens, charges and equities pertaining thereto.

ART. IX. Nothing in this agreement contained shall affect or prejudice any rights otherwise existing of the consolidated company to make such further increase of stock or bonds as said consolidated company may by law be entitled to make, or restrict the amount of stock or bonds which such consolidated company is by law authorized to issue or make. Nor shall anything herein contained affect or impair the right to issue all unissued bonds under the Kansas Pacific consolidated mortgage of date May 1, 1879, wherein Jay Gould and Russell Sage are trustees, but such un-

issued bonds may, notwithstanding this consolidation, be issued in the same manner, and with the same effect in all respects as if these articles had not been adopted and executed.

And it is expressly agreed that the stockholders of the consolidated company shall have all the powers which would have been possessed by the stockholders of each constituent company if this consolidation had not been effected, to ratify, approve, and carry out any contracts made by either constituent company, and requiring the ratification or approval of its stockholders.

The power of the Union Pacific Railroad Company to issue all unissued bonds under the mortgage of July 1, 1879, wherein the Union Trust Company is trustee, is fully and completely reserved.

ART. X. The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation. But nothing herein contained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company. The corporate existence of the respective constituent companies shall not absolutely cease, *eo instanti*, on the consummation of the union and consolidation herein provided for, but shall remain and continue so far as necessary to carry out the intent and purpose hereof.

ART. XI. These articles of consolidation shall go into effect, and the consolidated company hereby formed shall come into existence upon the day on which a copy hereof is filed in the Department of the Interior, as provided in the legislation in Congress in that behalf.

ART. XII. The existing by-laws of the Union Pacific Railroad Company are hereby provisionally adopted, and shall apply to the company hereby formed until duly changed or repealed.

ART. XIII. All books, vouchers, records, instruments of title, cash, evidences of debt, contracts, and documents pertaining to the business or property of the said three companies, parties hereto, shall, without delay, be delivered to the proper officers of the consolidated company, and the said books, records and papers shall be deemed and taken, as far as necessary, as the records and books of said consolidated company; and said books, records, vouchers, and papers shall be subject to the proper examination and inspection of all persons interested therein.

ART. XIV. These articles may be amended and modified from time to time, and in such manner as the holders of two-thirds of the stock of the consolidated company may direct or approve.

ART. XV. This agreement shall be executed on the part of the respective parties hereto, by the proper officers, and under the corporate seals of said companies.

In witness whereof, the said parties have caused their respective cor-

porate seals to be hereunto affixed, and the same to be attested by their respective presidents and secretaries, this the 24th day of January, A. D. 1880.

[Seal.] THE UNION PACIFIC RAILROAD COMPANY,
BY SIDNEY DILLON, *President.*

Attest: HENRY MCFARLAND, *Secretary.*

[Seal.] THE KANSAS PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*

Attest: A. H. CALEF, *Secretary.*

[Seal.] THE DENVER PACIFIC RAILWAY & TELEGRAPH CO.,
BY D. M. EDGERTON, *President.*

Attest: D. H. MOFFATT, JR., *Acting Secretary.*

The Union Pacific Railway Company has signified, and hereby signifies, its assent to and acceptance of the foregoing articles of union and consolidation, January 24, 1880.

[Seal.] THE UNION PACIFIC RAILWAY COMPANY,
BY SIDNEY DILLON, *President.*

The petition further alleges, that by the terms of the charter of the Kansas Pacific Railway, meaning the acts of the Legislature before quoted, the Legislature of the State of Kansas might at any time require a statement from the said company as to the progress of its work, the amount of its business, and the receipts of the said company, and the books and accounts of said company might at any time be investigated by a committee appointed by the Legislature; and further, it became the duty of the said company to make an annual report to the Secretary of the State of Kansas, of the operations of the railroad for the year ending on the first day of December, which report should be verified by the oaths of the treasurer and acting superintendent of operations, and filed in the office of the Secretary of State by the third Monday in December in each year, which statement should contain—first, the capital stock of said company, and the amount actually paid in; second, the amount expended for the purchase of land for the construction of the road, for buildings, for engines and cars, respectively; third, the amount and nature of its indebtedness and the amount due the corporation; fourth, the amount received for the trans-

portation of passengers, of mails, of property, and from all other sources; fifth, the amount of freight, specifying the quantity and contents, all the products of the forest, of animals, all vegetable food, and all other agricultural products, manufactures, merchandise and other articles; sixth, the amount paid out for repairs; seventh, the number and amount of dividends, and when made; eighth, the number of engine houses and shops, all engines and cars and their character; ninth, the number of miles run by passenger, freight and all other trains, respectively; tenth, the number of men employed and their occupations; eleventh, the number of persons injured in life or limb, and the cause of such injuries; twelfth, whether any accidents have arisen from carelessness or negligence of any person in the employ of such corporation, and whether any such person is retained in the employ of the corporation.

The petition then alleges that the Kansas Pacific Railway Company has wholly failed and neglected to comply with the foregoing duties and obligations owing by it to the State under the terms of its charter, but on the contrary thereof, the corporation has removed all of its offices, all of its books of account and statistics, outside of the jurisdiction of the State of Kansas, and has and holds all its general offices, and all accounts of its operations, at the general offices of the pretended consolidated company at Omaha, in the State of Nebraska, and alleges and pretends that the Kansas Pacific Railway Company no longer owes any duty under its charter to the State of Kansas, but that it is controlled as to its chartered obligations by the acts of Congress creating the Union Pacific Railroad Company, and by the unlawful articles of consolidation.

The petition further alleges, in particular terms a violation of the laws of the State of Kansas made and enacted

for its regulation, and in particular the disobedience of the following statute:

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. Every corporation created by or existing under the laws of this State, shall have and keep a general office for the transaction of business, and shall keep such office within this State, and shall have at least three of its directors citizens and residents of this State; and in case such corporation is a railroad or railway company, it shall have such general office located on or near the main line of its road or route mentioned in its charter. At such general office shall be kept the records and books of the corporation, and also the office of the superintendent, general manager or director, secretary, auditor, treasurer and paymaster, general freight agent and general ticket agent, under whatever name the duties usually pertaining to such offices may be transacted, together with all the books of accounts appertaining to the business of such offices.

"SEC. 2. Any corporation failing or refusing to obey any of the provisions of the first section of this act for the period of six months, shall be deemed to have forfeited its charter, and such forfeiture may be decreed by any district court of any county in which such corporation may do business, or into which any line of such railroad or railway may extend, in an action to be instituted for that purpose, in the name of the State of Kansas, by the county attorney of the county in which such action is prosecuted.

"SEC. 3. This act shall take effect and be in force from and after its publication in the *Daily Commonwealth*.

"Approved September 21, 1874."

And alleges affirmatively, further, that the company had removed its general offices from the State of Kansas to the city of Omaha, in the State of Nebraska, and placed the same under the absolute order, control, and disposal of said pretended consolidated company, and that at Omaha are now located all of its offices, all of its functions are exercised, all of its books of accounts appertaining to the business of such offices and the operations of the railroad have ever since been and are now kept.

The petition further alleges that the pretended consolidated company has possessed itself of all the property of the Kansas Pacific Railway Company, and holds, controls, operates and enjoys the same as a division of the consolidated company, to wit, "The Union Pacific Railway Com-

pany, Kansas Division;" and that the Kansas Pacific Railway Company is wholly managed and controlled as to all of its operations, and as to its traffic relations with the public, by the general officers of the Union Pacific Railway Company, at Omaha; and that these officers have placed in subordinate charge of the property in the State of Kansas a division superintendent, whose only functions are to maintain the track and run the trains of the company, under directions from Omaha, and a local freight agent and a local passenger agent, who are only authorized to make contracts with the public under the direction and subject to the revision and rejection of the officers located at Omaha.

The petition further alleges, that all the accounts of the operations of the road, including the superintendent and agents aforesaid, are paid upon vouchers issued at Omaha, from said general offices, and the right of employing or discharging said superintendent and agents, and all subordinate employés of the railroad, is absolutely held and controlled by the general manager of the consolidated company at Omaha, Nebraska; that all claims against the railroad made by the people of Kansas along the line of the railroad, for injury to, or destruction of person or property, are referred to the general officers in the city of Omaha, and all settlements which may be made thereon are subject to the absolute dictation and control of such officers; and that there is in the State of Kansas no officer or person clothed with full power to contract with the public at large, in respect of any of the dealings of the public with said railroad in any of its operations.

The petition further alleges, that since the pretended consolidation, the Kansas Pacific Railway Company has disobeyed the provisions of chapter 123, of the Session Laws of the State of Kansas, of 1871, respecting the duty of all

railroads to designate some person residing in each county into which the line of railroad runs, or in which its business is transacted, on whom all process and notices issued by any court of record, or justices of the peace of such county may or might be served; and to file a certificate of such appointment and designation in the office of the clerk of the district court of the county in which such person resides; which statute reads as follows:

AN ACT to provide for the service of process upon railroad and other corporations, and stage companies.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Every railroad company or corporation, and every stage company, doing business in the State of Kansas, or having agents doing business therein for such corporation or company, is hereby required to designate some person residing in each county, into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justice of the peace of such county may be served.

SEC. 2. In every case such railroad company or corporation, and stage company, shall file a certificate of the appointment and designation of such person, in the office of the clerk of the district court of the county in which such person resides; and the service of any process upon the person so designated, in any civil action, shall be deemed and held to be as effectual and complete as if service of such process were made upon the president, or other chief officer of such corporation or stage company. Any railroad company, corporation, or stage company, may revoke the appointment and designation of such person upon whom process may be served, as hereinbefore provided, by appointing any other person qualified as above specified, and filing a certificate of such appointment, as aforesaid; but every second or subsequent appointment shall also designate the person whose place is filled by such appointment.—[Chapter 123, Laws of Kansas 1870.

The petition further alleges, that the pretended consolidation of the Kansas Pacific Railroad with the companies is in direct violation of the following statute:

AN ACT to provide for the consolidation and extension of railroads in the State of Kansas.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any two or more railroad companies in this State, existing under general or special laws, and owning railroads constructed wholly or in part, which when completed and connected will form a continuous line or lines of railroad, *and any railroad company organized as aforesaid, and any railroad company duly organized and existing under the laws of an adjoining*

State, whose lines of railroad shall connect at the State line so as to form when completed a continuous line of railroad, are hereby authorized to consolidate and form one company owning and controlling such continuous line or lines of railroad, with all the rights, powers, privileges and immunities, and subject to all the obligations and liabilities to the State, which belong to or vested upon either of the companies making such consolidation. . . . —[Chapter 92, Laws of Kansas 1870.

That the Kansas Pacific Company was, at the time of the consolidation and previous thereto, a parallel and competing line with the Union Pacific Railroad Company's line, both originating on the west bank of the Missouri river and extending westwardly, and competing for the business of Cheyenne and Denver.

The foregoing allegations plead in a positive and definite way certain charges against the company, based without exception upon the statutes of the Territory and State of Kansas.

For the convenience of the court, they may be reduced to a brief and simple form. They are six in number. They contain the essence of the petition, and are the positions taken by the State against the company, and upon each one an issue may be fully tendered by the defendant.

The averments are:

1. The creation of the company by the acts of the Legislature of 1855 and 1857, and its organization and continued existence under that charter and the laws of the State of Kansas not inconsistent therewith, from the time of its organization until the present moment.

2. Its unlawful abandonment and surrender of its franchises and property, and its abjuration of its duties and obligations to the State under its charter and the laws of the State by the consolidation.

3. Its non-compliance with the requirements of its charter in respect to the making of a report as to the amount and extent of its operations to the Secretary of State.

4. Its failure to keep its general offices within the State, as required by law.

5. Its failure to appoint and designate some person in each county through which the road runs, upon whom service of process may be made, as required by the laws of Kansas.

6. Its attempted consolidation, in direct disobedience to the statutes of the State of Kansas, which forbid consolidation of companies in the State with companies out of the State, when the roads of such companies are parallel and do not connect at the boundary of the State, to make a continuous line.

II.

The answer filed by the defendant consists of denials and averments put in such a complex way that their true meaning and purpose cannot be ascertained, except upon a careful analysis. The answer may be mildly termed incoherent, and clearly evinces an intention to support their petition for removal, rather than to fairly and frankly meet the exigencies of this proceeding. There is, however, to be extracted from its confused averments, clear and explicit denials of most of the charges in the State's petition.

It premises its answer by a curious statement that it appears "for the purposes of this suit only." Since the State has no other purposes but those involved in this suit, we may fairly regard this language as meaningless and without force.

In answer to the first charge of plaintiff's petition, the defendant denies that it is a corporation created, organized or existing under the laws of the Territory or State of Kansas, or that it ever constructed, managed or operated a railroad under the charter of the Territory or State of Kansas, or under charter or legislation of the Territory or State of

Kansas. It denies that its name was changed from the Union Pacific Railway Company, Eastern Division, to the Kansas Pacific Railway Company, by action of its Board of Directors, and denies their authority to so change its name.

To the second charge of plaintiff's petition, it denies that it has abandoned or surrendered its franchises and property and its duties and obligations to the State, under its charters and the laws of the State, by the consolidation.

To the third charge, the defendant responds that it denies that it has failed in any duty owing under its charter, to report to the State the amount and extent of its operations.

To the fourth charge, it responds by a denial that it has removed its offices outside of the jurisdiction of Kansas, and that it holds all of its general offices and accounts of its operations at Omaha; denies that it has violated the laws of Kansas in this regard; denies that it is managed and controlled as to its operations and traffic relations from Omaha; denies that there has been placed in charge of the property a division superintendent under instructions from Omaha; denies that all of the claims against it in favor of Kansas citizens are referred to Omaha, and that there is in Kansas no person clothed with full power to contract with the public; denies that it has violated any of the laws of Kansas applicable to it in respect to keeping general and other offices in the State; and denies that it has violated any duty in this behalf towards Kansas.

To the fifth charge, it denies that it has failed in its duty under the law of the State to designate persons in each county through which the line of the road runs upon whom service of process could be made.

To the sixth charge, it responds with a denial that the consolidation is in violation of the statutes of the State of Kansas; denies that the Kansas Pacific Railroad was a

parallel and competing line with the Union Pacific Railway, and that the lines consolidated do not connect at the boundary of the State so as to make one continuous line.

In addition to these positive denials, the allegations of the petition are answered by special pleas in avoidance, to the effect that the State by its consent and course of dealing with this corporation has estopped itself from insisting upon some of the grounds of forfeiture. These matters will be considered in their proper place in this argument.

To this extent the answer is responsive to the charges preferred by the plaintiff, and presents the only issues made by the pleadings.

The remaining part of the answer consists of statements repeated in various forms, which may be compressed into the following averments: That the defendant company was created by the acts of Congress of 1862 and 1864; derived all the powers as a corporation it ever possessed from those acts; constructed and built its railroad under and by virtue of those acts, and owes all its obligations and duties of whatsoever nature to the authority thus creating it, and not to the State of Kansas.

There are certain admissions made in the answer flatly inconsistent with the foregoing position as broadly stated, which will be treated of in their proper place in the argument.

III.

The following is the petition filed by the defendant for the removal of the suit into the Circuit Court of the United States for the District of Kansas:

IN THE SUPREME COURT, STATE OF KANSAS.

The State of Kansas, *ex rel.* W. A. Johnston, as Attorney General, Plaintiff,
vs.
The Kansas Pacific Railway Company, Defendant. } No. 2969.

To the Honorable, the Supreme Court of the State of Kansas:

Your petitioner, the Kansas Pacific Railway Company, the defendant herein, presents this its petition for the removal of this suit into the Cir-

cuit Court of the United States for the District of Kansas, and respectfully shows and states to this honorable court as follows, to wit:

I. That this is a suit of a civil nature, commenced in and now pending in this honorable court, and that the amount in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars; and that the same is a suit arising under the constitution and under laws of the United States, to wit, under an act of Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, and various acts of Congress amendatory thereof and supplemental thereto; and that its decision involves the true and correct construction of the said constitution and laws of the United States, and the rights, titles and obligations of your petitioner thereunder, and that this application is made before or at the term at which said cause could be first tried, and before the trial thereof.

II. Your petitioner further states that it was at the time of the commencement of this suit and now is a corporation other than a banking corporation, organized and existing under the laws of the United States, to wit, under the aforesaid act of Congress, approved July 1, 1862, above referred to, and the various acts of Congress amendatory thereof and supplemental thereto. That this suit is a suit commenced in this court, to wit, the Supreme Court of the State of Kansas, being a court other than a circuit or district court of the United States, against your petitioner as such corporation; and is for an alleged liability of your petitioner as such corporation; and that your petitioner has a defense to this suit and the cause of action of the plaintiff herein, and as against the said plaintiff, arising under the constitution and under a law of the United States, to wit, said acts of Congress hereinbefore referred to; and that said defense involves the true and correct construction of the said constitution and the said law of the United States, to wit, said acts of Congress before referred to and the various acts of Congress amendatory thereof and supplemental thereto, and of the rights, titles and obligations of your petitioner under and by virtue thereof; and that the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars. Your petitioner states that this suit has not been tried, but is now pending for trial in this honorable court.

III. Your petitioner now, at the time of filing this, its petition, and in this court, offers good and sufficient surety for its entering in the Circuit Court of the United States for the District of Kansas, on the first day of its now next session, copies of all process against it, and all pleadings, depositions, testimony and other proceedings in this cause, and also for its there appearing and entering special bail in the cause or suit, if special bail was originally requisite therein; and your petitioner makes and files herewith a bond with good and sufficient surety for its entering in such Circuit Court on the first day of its now next session, a copy of the record in this suit and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that this suit was wrongfully or improp-

erly removed thereto; and also for its there appearing and entering special bail in this suit, if special bail was originally requisite therein. Wherefore, your petitioner prays this honorable court to accept this, its petition, and the said surety or bond, and to proceed no further in this suit.

[Seal.] THE KANSAS PACIFIC RAILWAY COMPANY,
By SIDNEY DILLON, *President.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

Sidney Dillon, being duly sworn, says: That he is the President of the above-named petitioner and defendant, the Kansas Pacific Railway Company; that he has read the foregoing petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. SIDNEY DILLON.

Sworn to before me, this 28th day of September, 1883.

[Seal.] EDWARD CANFIELD,
Notary Public, N. Y. City and Co.

Filed Nov. 2, 1883.—C. J. BROWN, *Clerk Supreme Court.*

This petition is drawn under and with a view to compliance with certain clauses of the removal acts of 1868 and 1875. The first clause of the petition seeks to bring the case within section 2 of the act of March 3, 1875, as follows:

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, . . . either party may remove said suit into the Circuit Court of the United States for the proper district."

In the second clause of the petition for removal, it is sought to bring the case within section 640 of the Revised Statutes, approved July 22, 1868, as follows:

"Any suit commenced in any court other than a Circuit or District Court of the United States, against any corporation, other than a banking corporation organized under a law of the United States or against any member thereof, as such member, for any alleged liability of such corporation, or of such member as a member thereof, may be removed for trial in the Circuit Court for the district where such suit is pending, upon the petition of such defendant verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution or of any treaty or law of the United States. Such removal in all other respects shall be governed by the provisions of the preceding section."

IV.

Under section 640 the parties seeking the removal must be, first, a corporation other than a banking corporation, organized under a law of the United States. In other words, it must be a Federal corporation. Second, if it is a Federal corporation, and the suit is for the alleged liability of the Federal corporation, it must, before it can remove, file a sworn petition that it has a defense arising under and by virtue of the constitution, treaties, or law of the United States.

A motion to remand the case puts the following matters in issue: First, the fact as to whether it is a corporation other than a banking corporation, organized under a law of the United States; second, whether it has by verified petition stated that it has a defense arising under the constitution, laws or treaties of the United States; third, whether the record shows such essential defense.

The court has a right to determine, then, the existence of these facts when questioned. The fact of its incorporation is to be determined from its charter, or from any other evidence available to the court. The fact as to the nature of the suit is to be determined from the declaration, petition, or bill of complaint, or whatever affirmative pleadings the plaintiff may have filed. If an answer has been put in, the nature of the defense is to be determined from that answer. The party seeking to remove, swearing that it is a corporation organized under the laws of the United States, neither makes it such in the contemplation of the court, nor precludes an investigation by the court *in limine* of the truth of the averment when the same is brought into question, nor is the court prevented from examining the plaintiff's decla-

ration or bill of complaint to see whether the suit is one against a Federal corporation.

Therefore as in this case, if the said corporation is sued and impleaded as a State corporation for an alleged liability arising under its charter, enacted by the State and the laws of the State passed for its regulation, it cannot confer jurisdiction upon the Federal court by asserting in its petition for removal that it is a Federal corporation. And if it is not a Federal corporation, the Federal court cannot, by the terms of this statute at least, assume jurisdiction because it makes a sworn statement that it has a defense arising under the constitution, treaties or laws of the United States.

It is therefore unimportant to consider, so far as this ground of removal is concerned, whether the defendant has a cause of action arising under the constitution or laws of the United States, provided we shall enable the court to satisfy itself from the record and from the laws of the United States, that this is no Federal corporation.

It is to be borne in mind throughout this argument, that this suit is against the Kansas Pacific Railway Company, alleging it to be a corporation created by the laws of the Territory and State of Kansas, organized under those laws, from time to time having changed its name to the Union Pacific Railroad Company, Eastern Division, and to the Kansas Pacific Railway Company, for a violation of the charter granted by the Territory of Kansas, and the laws of Kansas alleged to have been made for the regulation and government of this company.

Under this branch of this contention, it is therefore first important to know whether the Kansas Pacific Railway Company is, as it claims by the petition and by its answer, a corporation organized under the laws of the United States. In support of the averment that it is a Federal corporation, it

sets out in its answer the acts of Congress of July 1, 1862, and July 2, 1864, known as the Pacific Railroad acts, and the various acts amendatory thereto, and claims these to be the acts of its creation, its charter—the only repository of its powers, and the sole chart of its rights, duties and liabilities. It is unquestionably proper for the court to examine these acts to determine the truth of this claim. Such examination can have no reference to the construction of these acts in their possible bearing upon the controversy between the parties. When the charter is tendered to prove the fact of incorporation, as in this case, and that charter is the law of which this court is bound to take judicial cognizance, it is not only right and proper, but the duty of the court to examine such acts of Congress to see whether this corporation is what it is claimed to be, whether they provide for the creation and organization of a Federal corporation. Corporation or no corporation, is a jurisdictional fact which must be determined at the threshold. It is fitting that it should be so determined, for any act of Congress might be alleged as a charter, and if the court were to leave the determination of the fact until the trial, it would work hardship and delay, without any corresponding advantage to either party; because it would be the duty of the court upon the trial of the cause, when it should discover that the act of Congress did not sustain the claim of incorporation, to remand the cause.

The act of Congress of July 1, 1862, known as the first Pacific Railroad act, provides in the first section thereof as follows:

"That . . . together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of 'The Union Pacific Railroad Company;' and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity

within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one-hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, to the western boundary of Nevada Territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the board of commissioners of the Union Pacific Railroad and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners, by depositing a call thereof in the post office at Chicago, post-paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and Saint Louis. Said board shall organize by the choice from its number of a president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected

at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books and other books in their possession; and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders, two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the Government; any vacancy happening in the Government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a *bona fide* owner of at least five shares of stock in said company, except the two directors to be appointed by the President as aforesaid. Said company may, at any regular meeting of the stockholders called for that purpose, have power to make by-laws, rules and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate and effects of the company not inconsistent herewith, the transfer of shares, the term of office, duties and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice president and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen), and for the transaction of annual business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws."

The first section therefore of this act in express and definite terms incorporates the Union Pacific Railroad Company, fixes the amount of its capital stock, the number and kind of

its directors and officers, and prescribes minutely the method and manner by which it shall organize and govern itself as a corporation of the United States; and therein providing for the subscription to its capital stock, and the terms of its officers and adoption of by-laws, etc., etc.

The first mention of the Leavenworth, Pawnee & Western Railroad Company in the acts, is in section 9 of the act of 1862. It is there described as the Leavenworth, Pawnee & Western Railroad Company of Kansas.

In the first section of the act under consideration it will be observed that the language used is, that the Union Pacific Railroad Company is hereby "authorized and *empowered*" to construct, etc. In the ninth section, the Leavenworth, Pawnee & Western Railroad Company, of *Kansas*, is hereby "*authorized* to construct," simply, upon the same terms and conditions as the Union Pacific Railroad Company, from the Missouri river, at the mouth of the Kansas river on the south side thereof, so as to connect with the Pacific Railroad of Missouri; and in case the general route from the Missouri river to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of the "*Kansas Railroad*" before it reaches the meridian of longitude aforesaid, the location of said "*Kansas road*" shall be made so as to conform thereto. And again in this section it is said, "the said *Kansas* company may proceed to build said railroad to the aforesaid point," etc.

In section 10 the opening passage says: "And be it "further enacted, that the said company *chartered by the* "*State of Kansas* shall complete 100 miles of their said road, "commencing at the mouth of the Kansas river as aforesaid, "within two years after filing their assent to the conditions "of this act." And in the same section occurs the following language: "The Hannibal & St. Joseph Railroad, the

"Pacific Railroad Company of Missouri, and the first-named "company (Union Pacific Railroad), or either of them, on "filing their assent to this act, as aforesaid, may unite upon "equal terms under this act with the said *Kansas company*, "in constructing said railroad and telegraph to said meridian "of longitude *with the consent of the said State of Kansas.*"

And in section 12 of said act: "And the companies herein "named in Missouri, *Kansas* and California, filing their "assent to the provisions of this act, shall receive and trans- "port," etc.

And again, in section 13 occurs the following language: "That the Hannibal & St. Joseph Railroad Company of "Missouri may extend its roads from St. Joseph *via* Atchi- "son, to connect and unite with the road through Kansas, "upon filing its assent to the provisions of this act, upon the "same terms and conditions in all respects, for one hundred "miles in length next to the Missouri river, as are provided "in this act for the construction of the railroad and tele- "graph line first mentioned, and may for this purpose use "any railroad charter which has been or may be granted by "the Legislature of Kansas: *Provided*, That if actual survey "shall render it desirable, the said company may construct "their road, *with the consent of the Kansas Legislature*, on "the most direct and practicable route west from St. Joseph, "Missouri, so as to connect and unite with the road leading "from the western boundary of Iowa," etc. "But in no "event shall lands or bonds be given to said company, as "herein directed to aid in the construction of their said road, "for a greater distance than one hundred miles. *And the* "*Leavenworth, Pawnee & Western Railroad Company of* "*Kansas may construct their road from Leavenworth to unite* "*with the road through Kansas.*"

In the amendatory act of July, 1864, the first two sec-

tions are amendatory of certain provisions in the charter of the Union Pacific Railroad as to the number of shares of its capital stock, the qualifications of directors, the opening of subscription books, and the making of assessments upon the shareholders upon their subscription.

The 12th section of the act of 1864 contains the following language: "That the Leavenworth, Pawnee & Western "Railroad Conpany, now known as the Union Pacific Rail- "road, Eastern Division, shall build the road from the "mouth of the Kansas river, by the way of Leavenworth, "or if that be not deemed the best route, that the said com- "pany shall, within two years, build a railroad from the city "of Leavenworth to unite with the main stem at or near the "city of Lawrence."

Do these acts of Congress, then, either in express terms or impliedly, constitute this a corporation other than a banking corporation, *organized* under a law of the United States? It is admitted by the answer that the Leavenworth, Pawnee & Western Railroad Company was in existence and organized under a grant of corporate franchises from the Territory of Kansas at the time when the Pacific Railroad acts were passed. Do the Pacific Railroad acts treat it as anything else than a Kansas corporation? In the case of the Union Pacific Railroad Company, a corporation is created in unequivocal terms, and its organization provided for, but in the case of the Leavenworth, Pawnee & Western Railroad Company, describes it as the "Leavenworth, Pawnee & Western Railroad Company of Kansas," "the Kansas Railroad," "said Kansas road," "the said company chartered by the State of Kansas," "the said Kansas company," &c.

There is, therefore, in the acts themselves which are tendered as the charter of their creation and organization, plain positive, incontestable and entirely competent evidence, in

disproof of the fact, and the main fact upon which jurisdiction is sought to be conferred on this court under section 640 of the Revised Statutes. We might, if the jurisdiction depended upon its not being a State corporation, or in other words if we were put to the proof of the negative, that it was not a Federal corporation, safely rely upon the language of these acts alone to establish the fact that the company sought to be included by the acts of Congress within the Pacific system, under the name of the Leavenworth, Pawnee & Western Company, was a Kansas corporation. The language of these acts needs no construction; they assert facts to exist which are not only inconsistent with the claim of the defendant that it is a Federal corporation, but absolutely disprove such claim. But these very acts have been passed upon by this court, and the status of this corporation as a State corporation has been judicially fixed and determined in a number of decisions.

For the convenience of the court, we herewith print extracts from these opinions as an additional element of proof that the Kansas Pacific Company is not a corporation organized under the laws of the United States. The case of *Thomson v. Union Pacific Railroad Company, Eastern Division*, 9 Wallace, 579, was a suit in equity by Thomson and other stockholders against the Union Pacific Railroad Company, Eastern Division, and certain county treasurers of the State of Kansas, to restrain the treasurers from collecting and the company from paying certain taxes imposed by the State of Kansas. The stockholders were non-residents. In the statement of the case the following language appears:

"The Union Pacific Railway Company, Eastern Division, was originally incorporated in 1855, by the Legislature of the Territory of Kansas, as the Leavenworth, Pawnee & Western Railroad Company, with authority to construct the road from the west bank of the Missouri to the western boundary of the Territory. Subsequently, in 1862, under an act of the

State of Kansas, it assumed its present name, with authority to unite or consolidate with any other company or companies organised or to be organized under the laws of the United States, or of any State or Territory."

The statement further recites that the Union Pacific Company, chartered by Congress, was authorized—

"To connect with the Central Pacific Railway Company, incorporated by the State of California, and so to form, in connection with Eastern roads, a continuous line from ocean to ocean. Several other railroad companies, already incorporated by Missouri and Iowa, as well as the company just mentioned chartered by Kansas, were authorized to construct roads through the National territory, so as to join the Union Pacific Road on the hundredth meridian; and to all these roads large grants of land were made, and large subsidies engaged on the security of a second mortgage, upon the condition of paying at maturity the bonds advanced by way of subsidy, and of rendering certain services to the Government in the transmission of messages, and in the transportation of mails, troops, munitions, and other property, at reasonable rates of compensation.

"But neither by the original act, nor by any amendment, did Congress undertake to incorporate any railroad company, or authorize the construction of any railroad within the limits of any State, without the consent of the State concerned: and this was as true of the Union Pacific Railway Company, Eastern Division, as of any other of the roads aided by Congress. Whatever was done by Congress in reference to this last-named road, was done not merely with the consent, but upon the solicitation of the State of Kansas. *The corporation, however, remained a State corporation, though entitled to certain benefits, and subject to certain duties under the legislation of Congress.*"

In the brief of the counsel for the complainant in this case, (Attorney-General Hoar and Hon. J. P. Usher appearing for the complainant,) it was contended that the property of the company was exempt from State taxation—first, because it was a State corporation, and

"Because by the sixteenth section of the charter of the company the State has the right to purchase the road at the end of fifty years. The section is as follows: 'Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State or States through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued by persons to be mutually chosen by the State and by said company.'"

It therefore appears that the company itself, through its attorney, Mr. Usher, in an agreed statement of facts declared

itself to be a State corporation, and its property, contingently under its charter, the property of the State.

This court, in its opinion in this case, upheld this view of its corporate status and relationship. We quote a few paragraphs from the learned opinion of the late Chief Justice CHASE:

"But we are not aware of any case in which the real estate, or other property of a corporation *not organized* under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government. . . . We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland* beyond its terms. We cannot apply it to the case of *a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection.* . . . And because of these advances and these grants, and this fully compensated employment, it is claimed that this *State corporation, owing its being to State law*, and indebted for these benefits to the consent and active interposition of the State Legislature, has a constitutional right to hold its property exempt from State taxation; and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the Government."

In the case of *The Railroad Company v. Peniston*, 18 Wallace, 5, a suit by the Union Pacific Railroad Company directly to accomplish the same object sought to be accomplished by the defendant company in the Thomson suit, namely, to evade and escape from its share in the burden of State taxation, the court held the following language:

"It is, however, insisted that the case of *Thomson v. The Union Pacific Railroad Company* differs from the case we have now in hand, in the fact *that it was incorporated by the Territorial Legislature, and the Legislature of the State of Kansas, while these complainants were incorporated by Congress.* We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this, to distinguish the case from *McCulloch v. The State of Maryland.* But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments, or

agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of national powers. As was said in *Weston v. Charleston*, they cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress, or by a State Legislature."

In the case of *The Union Pacific Railroad Company v. Hall*, this court, speaking of the relation of the several branches of the Pacific system, says, on page 345 of the 91st United States Reports: "The 9th section authorized the "Leavenworth, Pawnee & Western Railroad Company *of* "*Kansas* (now the Kansas Pacific) to construct a railroad "from the Missouri river at the mouth of the Kansas river, "on the south side thereof, so as to connect with the Pacific "Railroad of Missouri to the point of the western depart- "ure of the Union Pacific on the one-hundredth meridian. "Thus a provision was made for a western connection by an "unbroken line of road to St. Louis on the Mississippi."

In the case of *The Missouri, Kansas & Texas Railway Company v. Kansas Pacific Railway Company*, 97 U. S. 491, the question of conflicting title between the two companies, parties to the suit under grants from the United States, was sought to be determined. On page 493, Mr. Justice FIELD, in his opinion in that case, has occasion to discuss the status of the defendant company in its relation to the Pacific Railroad system, and states it to be as follows:

"The act contemplated several branches, one of which was to be constructed by the Leavenworth, Pawnee & Western Railroad Company, the name of which was, as already stated, afterwards changed to that of the Kansas Pacific Railway Company. It authorized this company, which was *incorporated by the State of Kansas*, to construct a railroad and a telegraph

line from the Missouri river at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri at the initial point named, upon the same conditions in all respects as were provided for the construction of the main road and line. In case the general route of the main road was located so as to require a departure northwardly from the proposed line of the *Kansas road* before it reached the meridian of longitude mentioned, the location of the *Kansas road* was to be made to conform to it. The route in Kansas, west of the meridian of Fort Riley, to the point mentioned on the one-hundredth meridian of longitude was to be made subject to the approval of the President of the United States, and to be determined by him on actual survey."

In the case of *The United States v. The Kansas Pacific Railway Company*, 99 U. S., page 456, an action brought to recover the five per cent. of the net earnings of the road to be applied to the reduction of its indebtedness to the United States, this court, in an opinion delivered by Mr. Justice BRADLEY, referred to the defendant as follows:

"The Kansas Pacific Railway Company *was originally chartered in 1855, by the Territory of Kansas*, under the name of the Leavenworth, Pawnee & Western Railroad Company, mentioned in the ninth section of the act of 1862, and afterwards, in 1863, received the name of the Union Pacific Railway Company, Eastern Division, and finally in 1869, that which it now bears. By the section referred to, it was authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, so as to connect with the Union Pacific at the initial point on the one-hundredth meridian, 'upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned' (that is, the Union Pacific)."

We have shown in the above extracts the views this court has uniformly taken as to the status of the Leavenworth, Pawnee & Western Railroad Company, declaring it, whenever occasion required a reference to it, to be a Kansas corporation, chartered and organized under the laws of the State of Kansas.

The State of Kansas has always regarded this company as one of her own corporations, and as drawing its vitality from her laws.

The defendant, in its answer, refers to a concurrent resolution passed by the Legislature of the State of Kansas on

the first of March, 1864. That resolution is a memorial to Congress from the Legislature, in terms asking that Congress shall impose as a condition to the bounty of the Government proposed to be granted the defendant company under the Pacific Railroad acts, that it make certain towns in Kansas points upon its proposed line. To this resolution the Legislature carefully appended the following proviso:

"*Provided*, That nothing in these resolutions shall be construed or understood to affect the original act of the Territory of Kansas, entitled 'An act to incorporate the Leavenworth, Pawnee & Western Railroad Company,' or to affect the location of the road, commencing in Leavenworth, provided for in said act."

Another resolution is referred to as adopted by the Legislature of Kansas on the 4th of March, 1862, urging Congress to pass what is known as the "Rollins bill." A reference is also made to certain provisions which were contained in the Rollins bill. The section provides for the consolidation of certain State companies to construct the Pacific Railroad upon the terms and conditions provided in the act, "*and in conformity with the charters of said companies in the "States of California and Kansas respectively, so far as the "line of said road is situated within said States.*" By this resolution, therefore, it is plain that the State had in contemplation a maintenance of its control over this company as being subject to its charter. There have been very few occasions for an affirmative declaration on the part of the State as to this company being one of her own corporations and subject to her laws. This fact has never been a disputed one even, and the State has always so regarded the Kansas Pacific Railway Company, and treated it as such. The first suggestion that it was not such a corporation coming from any source, is the declaration contained in the articles of consolidation between the Union Pacific, Denver Pacific, and defendant companies. When this astounding

claim was first made, the State through the proper branch of its government, the legislative, at its very first session after such attempted consolidation, and at the very first opportunity which offered, directed an investigation by the Attorney General, of the law, to determine whether such claim had any foundation. It therein evinced a desire not to act hastily or unadvisedly. (See resolution, *ante*, page 3.)

As late as 1880, the Supreme Court of the State of Kansas, in the case of *Grinter v. K. P. Rly. Co.*, 23 Kas. 654, says in reference to the corporate status of this company: "The defendant is admitted to be the successor of the "Leavenworth, Pawnee & Western Railroad Company, and "entitled to all the rights, franchises and powers of the lat-"ter company. The Kansas Pacific Railway Company was "originally chartered in 1855, by the Territory of Kansas, "under the name of the Leavenworth, Pawnee & Western "Railroad Company, mentioned in the said ninth section of "the act of 1862, and afterward, in 1863, received the name "of the Union Pacific Railway Company, Eastern Division, "and finally, in 1869, the name by which is is sued herein."

This is a declaration by the highest court in Kansas as to the character of this corporation, and likewise an admission by the company itself that it held its title to corporate franchises from the Territorial acts of 1855 and 1857 creating it.

The company has, by its course of dealing with the public and by all of its public acts and declarations, confirmed this view as to its corporate nature and habitat. It has openly availed itself of the laws of the State of Kansas touching its exercise of corporate rights and privileges, and has continually asserted and re-asserted that it was operated, managed, controlled and governed by its charter and by the laws of the State of Kansas concerning railway corporations not inconsistent with its charter. Under the statute which con-

fers the option upon companies created by special Territorial acts of Kansas, it has accepted the benefits and rights of certain provisions of general corporation laws adopted by the State of Kansas after its admission.

The following provisions are contained in chapter 23 of the Laws of 1868, "An act relating to private corporations:"

"SEC. 11. Every corporation, as such, has power: *First*, To have succession by its corporate name, for the period limited in its charter, and when no period is limited, for twenty years. *Second*, To maintain and defend judicial proceedings. *Third*, To make and use a common seal, and alter the same at pleasure. *Fourth*. To hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, as shall be requisite for such corporation to acquire, in order to obtain or secure the payment of any indebtedness or liability due to or belonging to the corporation. *Fifth*, To appoint and remove such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation. *Sixth*, To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock. *Seventh*, To enter into any obligation or contract essential to the transaction of its ordinary affairs. *Eighth*, To increase or diminish by a vote of its stockholders, cast as its by-laws may direct, the number of its directors or trustees, to be not less than three nor more than twenty-four, and may in like manner change its corporate name, without in any wise affecting its rights, privileges or liabilities.

"SEC. 12. Such change of name, or number of directors or trustees, shall take effect and be in force from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit, setting forth the name adopted, or the number of directors or trustees fixed, together with the date at which such change in name or number of directors or trustees was voted by the stockholders of such corporation.

"SEC. 13. When the name of a corporation shall have been changed, as provided in this article, notice of such change shall be immediately thereafter published by the president or other chief officer of the corporation, for six successive weeks, in some newspaper printed and published in the county in which the principal office of the corporation is located, and if there be no newspaper printed and published in such county, then in some newspaper having a general circulation therein."

In accordance with these provisions of the statute of Kansas, supplementary to and not inconsistent with the charter of the defendant company, the following record from the

minutes of the company was filed, and now appears in the office of the Secretary of State of the State of Kansas:

At the regular annual meeting of the Union Pacific Railway Company, Eastern Division, a majority of the stock of the company being represented, held at Lawrence, Kansas, April 5th, 1869, it was unanimously resolved that the name of this company be changed from that of the "Union Pacific Railway Company, Eastern Division," to that of the "Kansas Pacific Railway Company."

I hereby certify the above to be a true and correct record of the proceedings of the stockholders' meeting, held at Lawrence, Kansas, April 5th, 1869, as taken from the record books of the company.

[Seal.] D. M. EDGERTON,
Secretary Kansas Pacific R. W. Co.

ADOLPHUS MEIER, *Vice President.*

STATE OF KANSAS, }
COUNTY OF SHAWNEE, } ss.

D. M. Edgerton, being duly sworn, says that he is the Secretary of the Kansas Pacific Railway Company, formerly Union Pacific Railway Company, Eastern Division; that the name of said company was changed to the "Kansas Pacific Railway Company," by vote of its stockholders, on the 5th day of April, 1869, and a copy of the resolution and action of said stockholders of that date, as recorded on the books of the company, as above set forth; and this affidavit is made to supply the place of a former affidavit upon this subject, supposed to have been lost or mislaid in the office of the Secretary of State. D. M. EDGERTON.

Subscribed and sworn to before me, this 21st day of May, A. D. 1878.

J. THOMAS, *Notary Public.*

STATE OF KANSAS, }
SECRETARY'S OFFICE, } ss.

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing, filed in my office May 21st, A. D. 1878.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 29th day of May, 1883.

[Seal.] JAMES SMITH, *Secretary of State.*

Section 25 of chapter 23 of the Laws of Kansas, (General Statutes of 1868,) being an act concerning private corporations, is as follows:

"SEC. 25. Any corporation heretofore organized, and now in existence, under any general or special law of the Territory or the State of Kansas, may, by a vote of its board of directors, accept any or all the provisions of this act, and have and exercise all the rights, powers and privileges conferred by this act, by filing a copy of their acceptance with the Secretary of State, whereupon that portion of their charter inconsistent with

this act, or the portion accepted, shall cease to be applicable to such corporation; and they shall have the exclusive right to carry out the objects of said corporation, as described in their act of incorporation or certificate filed with the Secretary of State, if acting under a general law within the limits and boundaries described in said act of incorporation, or certificate, as the case may be, without any limitation as to time, and shall possess all the privileges and franchises conferred by their act of incorporation or certificate filed with the Secretary of State, not abandoned in the copy of acceptance of any or all the provisions of this act."

Under and by virtue of the authority granted by this statute, the Kansas Pacific Railway Company, by a vote of its Board of Directors on the 5th day of January, 1871, adopted a resolution accepting certain provisions of the laws of Kansas; and having made a copy of the same, duly certified under its seal and verified by the secretary of the company, transmitted it to the office of the Secretary of State, where it is now upon file, and from whence we have obtained it. The following is a copy of the paper now on file in the office of the Secretary of State of the State of Kansas:

OFFICE OF THE KANSAS PACIFIC RAILWAY COMPANY,
LAWRENCE, KANSAS, January 5th, 1871.

At a meeting of the Board of Directors of the Kansas Pacific Railway Company, held at the office of the company in the city of Lawrence on the fifth day of January, 1871, present a quorum of said board. Among other proceedings, the following was had, viz.:

It was moved by Robt. E. Carr and seconded by Adolphus Meier, that sections 14, 19, 23 and 25 of article 3, chapter 23 of the General Statutes of the State of Kansas, A. D. 1868, being an act entitled "An act concerning private corporations," be accepted by this company and made a part of its charter. Whereupon the Board of Directors proceeded to vote upon said motion by "ayes" and "noes." Those voting "aye" were Adolphus Meier, Robt. E. Carr, Geo. D. Hall, B. W. Lewis, jr., C. S. Greeley, and John D. Perry. Those voting "no" were none. And it appearing that all the members present had voted in the affirmative, it was unanimously resolved and declared that the aforesaid sections 14, 19, 23 and 25 of article 3, chapter 23 of the General Statutes of the State of Kansas A. D. 1868, of the act entitled "An act concerning private corporations," be and the same are hereby declared to be portions of the charter of this company, pursuant to said section 25 and as therein provided; and that the secretary of this company make and file with the Secretary of State of Kansas a certified copy of this action of the Board.

STATE OF KANSAS, } ss.
COUNTY OF DOUGLAS, }

I, Charles B. Lamborn, Secretary of the Kansas Pacific Railway Company, do hereby certify that on the fifth day of January, 1871, at a meeting of the Board of Directors of said company, held at the office of the company, in the city of Lawrence, the foregoing declaration and resolution was adopted by said board, and duly recorded in the minutes of the Board of Directors, and that in pursuance thereof this certificate is made.

In witness whereof, I have hereunto set my hand and affixed the seal of the company.

CHAS. B. LAMBORN,
[Seal.] *Secretary K. P. R. W. Co.*

STATE OF KANSAS, } ss.
DOUGLAS COUNTY, }

Charles B. Lamborn, being duly sworn, deposeth and saith, that he is the Secretary of the Kansas Pacific Railway Company; that the foregoing paper, purporting to be a declaration of the Board of Directors, is a genuine copy from the minutes of said Board, and that his certificate, with the seal of the company thereto attached, is also genuine, and made for the purpose in said certificate indicated; and further saith not.

[Seal.] S. J. GILMORE, *Notary Public.*

January 5th, 1871.

[Stamp.]

Filed January 5th, 1871, at 6:45 o'clock P. M.

STATE OF KANSAS, OFFICE OF SECRETARY OF STATE.

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office January 5th, A. D. 1871.

In testimony whereof, I have hereunto subscribed my name, and affixed my official seal.

Done at Topeka, Kansas, this 14th day of January, A. D. 1884.

[Seal.] JAMES SMITH, *Secretary of State.*

The sections adopted by the company as part of its charter are sections 14, 19, 23, and 25. Section 25 furnished the authority under which the adoption was made, and is printed above. Sections 14, 19 and 23 are as follows:

"SEC. 14. Any corporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital, by a vote of the stockholders, in conformity with the by-laws thereof; and if a majority of the stockholders shall vote for the increase of stock, the same may be increased by the board of directors, trustees or other business managers of such corporation; and upon such increase of stock being made, in accordance with the by-laws, the date and amount of such increase shall be certified to the Secretary of State by the directors or trustees, and from the time such certificate is filed, the increase of stock shall become a part of

the capital thereof. Such certificate shall be filed and recorded in the same manner as the charter."

"SEC. 19. The directors or trustees may adopt by-laws for the government of the corporation; but such by-laws may be altered, changed or amended by a vote of the stockholders, at an election to be ordered for that purpose, by the directors or trustees, on the written application of a majority of the stockholders or members."

"SEC. 23. The directors or trustees shall have the general management of the affairs of the corporation, and may dispose of the residue of the capital stock at any time remaining unsubscribed, in such manner as the by-laws may prescribe. They shall cause a record to be kept of all stock subscribed and transferred, and of all business transactions, and their books and records shall, at all reasonable times, be open to the inspection of any and every stockholder. They shall also, when required by one-third of the stockholders thereof, present reports in writing of the situation and amount of business of the corporation, and declare and make such dividends of the profits from the business of the corporation, as they shall deem expedient, or as the by-laws may prescribe."

In accordance with section fourteen and the Territorial acts of 1855 and 1857, at the meeting at which the foregoing proceedings were had, the company by its Board of Directors increased the capital stock of the company in a resolution adopted by them, duly certified and transmitted to the office of the Secretary of State of the State of Kansas, to be filed. The following is a certified copy of the same, obtained from that office, where it is now on file:

OFFICE OF THE KANSAS PACIFIC RAILWAY COMPANY,
LAWRENCE, KANSAS, January 5, 1871,
8 o'clock P. M.

At an adjourned meeting of the Board of Directors of the Kansas Pacific Railway Company, held at the office of the company in the city of Lawrence on the fifth day of January, 1871, present a quorum of said board, among other proceedings, the following was had, viz.:

In accordance with the by-laws of this company, and its charter, and the laws of the State, and in conformity with the direction of the stockholders now reported to the board, wherein the stockholders have resolved that the capital stock of this company shall be increased to, and be, ten millions ($10,000,000) of dollars, on motion it was unanimously resolved and declared that the capital stock of this company be increased to, and be, ten millions of dollars ($10,000,000).

This is to certify that the foregoing resolve and declaration, increasing the capital stock of the Kansas Pacific Railway Company, was made in accordance with the by-laws and direction of the stockholders of said com-

pany; that the capital stock of said Kansas Pacific Railway Company, by virtue of the direction and authority aforesaid, was, at a meeting of the Board of Directors, at the office of the company, in the city of Lawrence, on the 5th day of January, 1871, increased, and declared to be ten millions of dollars ($10,000,000), and the same is now hereby declared to be ten millions of dollars ($10,000,000), all of which we send, certified under our hands, Directors in said company, this the fifth day of January, 1871, with the request that the same be filed in the office of the Secretary of State.

JOHN D. PERRY.
ADOLPHUS MEIER.
ROBT. E. CARR.
B. W. LEWIS, JR.
GEO. D. HALL.
C. S. GREELEY.

Attest: CHAS. B. LAMBORN, *Secretary.*

STATE OF KANSAS, OFFICE OF SECRETARY OF STATE.

I, James Smith, Secretary of State of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing, filed in my office January 7, A. D. 1871.

In testimony whereof, I have hereunto subscribed my name, and affixed my official seal.

Done at Topeka, Kansas, this 14th day of January, A. D. 1884.

[Seal.] JAMES SMITH, *Secretary of State.*

The adoption of section 25 as a part of the charter of the defendant company involves a public admission upon its part that it is "a corporation heretofore organized, and now in existence under a special law of the Territory of Kansas," and a submission upon its part to the jurisdiction of Kansas as one of its corporations under the foregoing provisions, which were accepted.

The amount of the capital stock of a corporation is always fixed by its charter, and it can derive no authority to take subscriptions to capital stock or to issue capital stock from any other source than its charter.

The stock of the Kansas Pacific Railway Company was by its charter fixed at $5,000,000, to be divided into shares of $50 each. By the supplementary act of 1857, it was authorized to increase its stock to $10,000,000. In 1871 there had been issued $5,000,000 of capital stock, in shares of $50 each. Its authority to issue this stock is to be found

nowhere, save in the charter of 1855 and 1857. In 1871 it increased its capital stock to $10,000,000; its only authority for the exercise of this power is to be found in the provisions of its charter and the Kansas general laws, which it accepted and made part of its charter.

On the 6th day of May, 1875, the Kansas Pacific Company entered into an agreement to consolidate with the Colorado Central Company, a Colorado corporation. On the 4th day of May, 1876, a year thereafter, this agreement, duly certified, was filed in the office of the Secretary of State of the State of Kansas. We herewith reprint the consolidation agreement, for the purpose, first, to show that the Kansas Pacific Railway Company claimed a right to consolidate with a company of an adjoining Territory, not a part of the Pacific system; and second, that it claimed that right under and by virtue of the laws of the State of Kansas.

CONSOLIDATION AGREEMENT.

An agreement, made this sixth day of May, in the year one thousand eight hundred and seventy-five, between the Kansas Pacific Railway Company, party of the first part, and the Colorado Central Railroad Company, party of the second part.

Whereas the party of the first part owns a line of railroad extending from the Missouri river, at the mouth of the Kansas river, on the south side thereof, and from Wyandotte, in the State of Kansas, to Denver, in the Territory of Colorado, and the party of the second part owns a line of railway extending from Denver, in the Territory of Colorado, through Golden City to Floyd's Hill, with branches thereof extending through Boulder City to Longmont, and also extending to Black Hawk, all in said Territory of Colorado, and the said railways connect with each other and form a continuous line of railway from the Missouri river to the various points in Colorado before mentioned;

And whereas the said companies are authorized by law to consolidate their property and stock, and become one corporation, and it is believed that such consolidation will be beneficial to the stockholders of each of said companies, and to the public, now, therefore, this agreement, made and entered into by and between the two companies above named, witnesseth, that the said companies above named hereby agree, and each for itself agrees, that the property and stock of the said two corporations shall be consolidated, and said two companies shall be merged and consolidated

into and form one corporation, under the name of "The Kansas Pacific Railway Company;" and the parties hereto do hereby prescribe the following terms and conditions for the said consolidation, and the mode of carrying the same into effect:

ARTICLE 1. The directors of the said new corporation shall be eleven in number, and the officers thereof shall consist of a president, one or more vice presidents, a treasurer, a secretary, and such other officers as may be deemed necessary, all of whom shall be residents of the United States.

The following-named persons shall be the first directors thereof, whose respective places of residence are as follows, namely:

Robert E. Carr	St. Louis, Mo.
Adolphus Meier	" "
Carlos S. Greeley	" "
Benjamin W. Lewis, jr	" "
John D. Perry	" "
Joseph O. Neill	" "
Thomas A. Scott	Philadelphia, Pa.
Sidney Dillon	New York.
Jay Gould	" "
Oliver Ames	North Easton, Mass.
Grenville M. Dodge	Council Bluffs, Iowa.

The following-named persons, who reside respectively at the places stated opposite their several names, shall be the first officers of the said new corporation, as below designated, namely:

President—Robert E. Carr	St. Louis,	Mo.
Vice President—Adolphus Meier	"	"
Treasurer—Carlos S. Greeley	"	"
Secretary—David M. Edgerton	"	"
Executive Committee, Sidney Dillon	New York.	
Jay Gould	"	"
Adolphus Meier	St. Louis,	Mo.
Carlos S. Greeley	"	"
Robert E. Carr (*ex. off.*)	"	"

The said directors and officers shall continue to be such until the first Thursday of May, one thousand eight hundred and seventy-six, and until others are duly chosen in their places.

An election of directors of the said corporation shall be held at its office in Lawrence, Kansas, on the first Thursday of May, one thousand eight hundred and seventy-six, between the hours of eleven o'clock in the forenoon and two o'clock in the afternoon of that day, and elections for directors shall be held annually thereafter at such time or times and places as the said new corporation may, by its by-laws, designate; and election for directors may also be held in Colorado, if deemed necessary by the board of directors, at a time and place to be designated by the board, and specified in said by-laws. Notice of the time and place of each and every election shall be given in such manner as the said new corporation may, by its by-laws, designate.

ARTICLE II. The directors of the said new corporation shall be chosen annually by a majority of the votes of the stockholders voting in person, or by proxy, at such election. And they may and shall continue to be directors until others are elected and qualified in their places. No person shall be a director unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen; and vacancies in the board of directors may be filled by the remaining directors at any regular meeting of the board.

ARTICLE III. The capital stock of the new corporation shall be twenty millions of dollars, to consist of two hundred thousand shares of one hundred dollars each; of which, shares to the amount of ten millions of dollars shall be used in exchange for a like number of shares of capital stock of the Kansas Pacific Railway Company, party hereto of the first part; and of the residue of the said capital stock, sufficient shall be used to take up the outstanding stock of the party of the second part, by exchanging such consolidated stock, share for share, for the stock of said last-named company.

ARTICLE IV. Every stockholder in the Kansas Pacific Railway Company, party hereto of the first part, shall receive, in place of every two shares of this stock at the time held by such stockholder in such company, a share of the capital stock of the new corporation, upon his surrendering to be canceled to the new corporation, the certificate or certificates of stock held by such stockholder; and every stockholder in the Colorado Central Railroad Company, party hereto of the second part, shall receive, in place of each share at the time held by such stockholder in such company, a share of the capital stock of the new company, upon his surrendering to be canceled to the new corporation, the certificate or certificates of stock held by such stockholder in the said Colorado Central Railroad Company.

ARTICLE V. The said new corporation shall, without unnecessary delay, after the perfection of its organization, issue certificates of stock in such form as may by the board of directors be deemed advisable, and such board shall provide and adopt such rules and regulations as may be necessary and proper for the issuing and transfer of shares of stock of the said new corporation.

ARTICLE VI. All books, vouchers, records, instruments of title, cash, evidences of debt, contracts, and documents pertaining to the business or property of the said companies, parties hereto, shall, without delay, be delivered to the proper officers of the consolidated company; and the said books, records and papers shall be deemed and taken, as far as necessary, as the records and books of said consolidated company; and said books, records, vouchers and papers shall be subject to the proper examination and inspection of all persons interested therein.

ARTICLE VII. Said new corporation is authorized to issue its coupon mortgage bonds to the amount of five millions of dollars, having thirty years to run and bearing seven per cent. interest, principal and interest payable in lawful money of the United States, in the city of New York; which said bonds shall also be secured by a mortgage to a trustee or

trustees to be selected by the board of directors of the new corporation; and which bonds and mortgages shall be in such form and contain such provisions as may be determined by such board of directors, and such mortgage shall cover all the lines of railroad and rolling stock of the said consolidated company, or of either of the parties hereto, and shall be subject to the existing mortgage on the Colorado Central Railroad, and to the existing mortgages upon the Kansas Pacific Railway; but such consolidated mortgage shall not include any of the lands of the said last-named company lying between the three hundred and eightieth and the four hundred and fifth mile-post on the line of said road, but such lands shall be excepted from such mortgage.

ARTICLE VIII. Of said consolidated bonds so to be issued by the said consolidated company, one million two hundred and eighty-two thousand six hundred dollars shall be used by the consolidated company in retiring the outstanding income bonds of the original Kansas Pacific Railway Company, party hereto of the first part, at the rate of not more than thirty per cent. of their face, exclusive of interest; five hundred and seventy thousand dollars, or thereabouts, of said consolidated bonds shall be applied by said consolidated company to retire, either by exchange or otherwise, that amount of an issue of eleven hundred and twenty-five thousand dollars of outstanding bonds issued by the Arkansas Valley Railway Company, held by parties other than the Kansas Pacific Railway Company, party hereto, which said last-mentioned corporation holds the residue of the said issue; and bonds to an amount not exceeding thirteen hundred thousand dollars, together with so much of the ten millions dollars of stock hereinbefore mentioned as shall not have been exchanged for Colorado Central Stock, shall be issued to the floating-debt creditors of the Colorado Central Company in payment and extinguishment of such indebtedness, so that said last-named company shall, at such time, be free from all indebtedness except its funded debt.

ARTICLE IX. The residue of the said consolidated bonds not used and applied as above mentioned shall remain in the treasury of the consolidated company, and shall form a part of its assets and property, and shall be used as far as possible to redeem and retire six hundred thousand dollars of the first-mortgage bonds of the Junction City & Fort Kearney Railway Company, and four hundred and forty-five thousand dollars of an issue of fifteen hundred thousand dollars second-mortgage land-grant bonds of the present Kansas Pacific Railway Company; which said last-mentioned four hundred and forty-five thousand dollars of second-mortgage land-grants above mentioned shall be canceled and discharged; but the whole issue of eleven hundred and twenty-five thousand dollars of Arkansas Valley Railway Company bonds hereinbefore mentioned, and the six hundred thousand dollars of Junction City & Fort Kearney bonds hereinbefore mentioned, shall form part of the assets of the consolidated company.

ARTICLE X. All shares of stock of the Junction City & Fort Kearney Railway Company, the Arkansas Valley Railway Company, the Denver Pacific Railway and Telegraphic Company, the Denver & Boulder Val-

ley Railway Company, and all bonds made by either of said companies, now owned or held by either of the parties hereto, shall be transferred to and held by the trustees in the five million dollars consolidated mortgage hereinbefore mentioned, as further and additional security for the bonds to be issued thereunder.

ARTICLE XI. Nothing herein shall prejudice or affect the agreement made with the bond-holders of the Kansas Pacific Railway Company, party hereto of the first part, in regard to the funding the coupons on their bonds, but said agreement shall be carried out by the consolidated company.

ARTICLE XII. Upon the making and effecting of this agreement and the ratification and approval thereof by parties representing two-thirds of all the stock held in each of the companies parties hereto, at a meeting of the holders of the stock of said company, or by the approval in writing of the parties or persons holding and representing two-thirds of such stock, and upon the filing of this agreement or a copy thereof in the manner prescribed by law, the parties hereto shall be taken and deemed to be one corporation by the name provided in this agreement, and shall possess within the State of Kansas and Territory of Colorado all the rights, privileges, exemptions and franchises of each of said companies so consolidated.

ARTICLE XIII. The parties hereto of the first and second parts assign, transfer, set over and convey unto the said Kansas Pacific Railway Company, the consolidated corporation hereby agreed to be formed, all the rights, privileges, exemptions and franchises of each of said companies parties hereto, and all the property, real, personal and mixed, and all choses in action, debts on whatever account, of, owing or belonging to either of said companies, and all claims, demands, property, rights of way, leases, leasehold interests, branches, iron rails, rolling stock, tools and implements, and property of every description, name and nature, belonging to either of the said companies, with the appurtenances, to be held, owned, and controlled by the said consolidated corporation, its successors and assigns, as fully and completely to all intents and purposes as the respective parties hereto do, or can now own, hold, use, enjoy, or control the same; and the parties hereto agree, on the consummation of the said act of consolidation, to execute and deliver to said consolidated corporation instruments of transfer or assignments, or other instruments proper or necessary to carry out the covenants, conditions and provisions of this agreement.

ARTICLE XIV. Nothing in this agreement contained shall affect or prejudice the right of the consolidated company to make such further increase of stock or bonds as said consolidated company may by law be entitled to make, or restrict the amount of stock or bonds which such consolidated company is authorized to issue or make.

ARTICLE XV. The board of directors of the new corporation are authorized and empowered to adopt such rules, regulations, and by-laws, for the management of the affairs of the new corporation as to them may seem advisable, and to do all acts necessary and proper to be done to carry out the purposes and to secure the objects of this agreement.

ARTICLE XVI. This agreement may be amended and modified from

time to time, and in such manner as the holders of two-thirds of the stock of the consolidated company may direct or approve.

ARTICLE XVII. This agreement shall be executed on the part of the respective parties hereto by the proper officers, and under the corporate seals of said companies.

[Seal.] KANSAS PACIFIC RAILWAY COMPANY,
By ROBT. E. CARR, *President.*

D. M. EDGERTON, *Secretary.*

THE COLORADO CENTRAL RAILROAD COMPANY,
By OLIVER AMES, *Vice President.*

[Seal.] Attest, I. H. ROLLINS, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, } ss.
COUNTY OF SUFFOLK, CITY OF BOSTON, }

Be it remembered, that on the seventeenth day of March, in the year of our Lord one thousand eight hundred and seventy-six, before me, James B. Bell, a Commissioner of Deeds in and for the city of Boston, county of Suffolk, and Commonwealth of Massachusetts, residing in said city, duly commissioned and authorized by the Governor, and qualified under the laws of the Territory of Colorado, and State of Kansas, to take the acknowledgment and proof of the execution of deeds and other instruments in writing, under seal or not, to be used or recorded, and to take depositions, to administer oaths, and affirmations, &c., personally appeared Oliver Ames, Vice President, and I. H. Rollins, Secretary of the Colorado Central Railroad Company, who are personally known to me to be the Vice President and Secretary of the said railroad company, the corporation that executed the foregoing and annexed instrument, and acknowledged to me that they executed the same as the act and deed of the said Colorado Central Railroad Company, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal, as Commissioner of Deeds for the Territory of Colorado and State of Kansas, at my office in the city, county and Commonwealth aforesaid, on this day and year above written.

[Seal.] JAS. B. BELL,
A Commissioner of Deeds for the Territory of Colorado and State of Kansas.

STATE OF MISSOURI, } ss.
CITY AND COUNTY OF ST. LOUIS, }

Be it remembered, that on the first day of May, in the year of our Lord one thousand eight hundred and seventy-six, before me, A. H. Calef, a Commissioner of Deeds in and for the city of St. Louis, State of Missouri, residing in said city, duly commissioned and authorized by the Governor and qualified under the laws of the State of Kansas and Territory of Colorado to take the acknowledgment and proof of the execution of deeds and other instruments in writing, under seal or not, to be used or recorded, and to take depositions, to administer oaths and affirmations, &c., personally appeared Robert E. Carr, President, and D. M. Edgerton,

Secretary of the Kansas Pacific Railway Company, who are personally known to me to be the President and Secretary of the said railroad company, the corporation that executed the foregoing and annexed instrument, and acknowledged to me that they executed the same as the act and deed of the Kansas Pacific Railway Co., for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal as Commissioner of Deeds for the State of Kansas and Territory of Colorado, at my office in the city and State aforesaid, on this day and year above written.

[Seal.] A. H. CALEF,

A Commissioner of Deeds for the State of Kansas and Territory of Colorado.

Consolidation agreement, between the Kansas Pacific Railway Company and the Colorado Central Railroad Company.—Filed for record May 4, 1876.—THOS. H. CAVANAUGH, Sec'y of State.

On the 4th day of February, 1867, Hon. J. P. Usher, then and now the general attorney of the Kansas Pacific Railway Company, addressed a memorial to Hon. Samuel J. Crawford, Governor of Kansas, which he asked to have transmitted to the Legislature with recommendations. The memorial was in the nature of a petition asking for a remission of the taxes of the State for a number of years, or for an assessment for purposes of taxation upon the net income of the road instead of upon its value as represented by its cost. In the opening passages of this memorial, Judge Usher uses the following language:

"It is well known to all, that the company is operating under a charter granted by the Governor and Legislative Assembly of the Territory of Kansas, incorporating the Leavenworth, Pawnee & Western Railroad Company, (Laws of 1855, page 914,) and of the several acts passed at the instance of the company, amendatory thereof. The company has not waived or abandoned its charter, nor has it availed of or adopted the general railroad law passed by the Legislature at its fifth session."

This memorial is to be found in full on page 346 of the Senate Journal of the Legislature of Kansas for the year 1867.

The Kansas Pacific Railway Company, under its various names and under the authority of the charter granted in 1855, and the laws of Kansas, has executed various mort-

gages upon its property for loans of money. These mortgages are on file in all the courts of Kansas through which the road runs, and are included in the various reports of the company to its stockholders. In all of these mortgages the company has stated in express terms its authority for making the same, as well as its authority to exist as a corporation. We have copies of these mortgages, which will be admitted to be correct by the defendant in court, but for the convenience of the court we herewith copy in our argument such paragraphs from each as amount to admissions on the part of the company, and show how it regarded itself, and under what authority it assumed to act.

On the first of June, 1869, it executed a mortgage to J. Edgar Thompson, Adolphus Meier, and John A. Stewart, for $6,500,000. The following language is used in the first paragraph of the mortgage:

"An indenture, made the twentieth day of June, in the year one thousand eight hundred and sixty-nine, between the Kansas Pacific Railway Company, *a corporation created by and existing under the laws of Kansas* and of several acts of Congress, party of the first part, and John Edgar Thomson, of the city of Philadelphia, Adolphus Meier, of the city of St. Louis, Missouri, and John A. Stewart, of the city of New York, parties of the second part.

"Whereas, the party of the first part is a corporation with full power and authority to execute this indenture, and was originally *created by act of the Legislature of the Territory of Kansas*, under the title of the Leavenworth, Pawnee & Western Railroad Company, *which title was, on the 6th day of June, 1863, at a regular meeting of the stockholders of said company, in pursuance of authority given by act of the Legislature of the State of Kansas*, duly changed to 'The Union Pacific Railway Company, Eastern Division,' and in pursuance of such authority, and likewise of an act of Congress, such title was afterward duly changed to 'The Kansas Pacific Railway Company.'"

Another mortgage was made by the company on the 1st day of June, 1866, in which the following language is used:

"This indenture, made this first day of June, eighteen hundred and sixty-six, between the Union Pacific Railway Company, Eastern Division, *a corporation created under the laws of Kansas*, party of the first part, and

John Edgar Thomson, of the city of Philadelphia, and Adolphus Meier, of the city of St. Louis, Mo., parties of the second part, witnesseth, that whereas the Union Pacific Railway Company, Eastern Division, pursuant to the term of *their charter granted by the Governor and Legislative Assembly of the Territory of Kansas*, in the United States of America, incorporating them, the amendments thereto by the State of Kansas," etc.

Another mortgage was filed by the company, known as the Leavenworth Branch mortgage, January 1st, 1866. The opening paragraph is as follows:

"This indenture, made this the first day of January, in the year eighteen hundred and sixty-six, between *The Union Pacific Railway Company, Eastern Division, a corporation created under the laws of Kansas*, of the first part, and John Edgar Thompson, of the city of Philadelphia, and Henry M. Alexander, of the city of New York, of the second part, witnesseth," etc.

On the first day of August, 1865, the company filed another mortgage upon their property from the Missouri river to Fort Riley, known as the six-per-cent. gold mortgage. It describes itself in the opening passage as follows:

"This indenture, made this the first day of August, eighteen hundred and sixty-five, between *The Union Pacific Railway Company, Eastern Division, a corporation created under the laws of Kansas*, party of the first part, and John Edgar Thompson, of the city of Philadelphia, and Henry M. Alexander, of the city of New York, parties of the second part, witnesseth: That whereas, the Union Pacific Railway Company, Eastern Division, pursuant to the terms of their charter granted by the Governor and Legislative Assembly of the Territory of Kansas, in the United States of America, incorporating them, the amendments thereto by the State of Kansas, and the act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1st, 1862, and the several acts of Congress amendatory thereof," etc.

On the first day of July, 1866, the company executed and filed another mortgage, known as the income mortgage, from which we copy the following paragraph, stating the character of the company as grantor:

"This indenture, made this first day of July, 1866, between the Union Pacific Railway Company, Eastern Division, *a corporation created under the laws of Kansas*, party of the first part, and Carlos S. Greeley and Adolphus Meier, of the city of St. Louis, parties of the second part,

"Witnesseth: That whereas, the Union Pacific Railway Company,

Eastern Division, pursuant to the terms of their charter granted by the Governor and Legislative Assembly of the Territory of Kansas, in the United States of America, incorporating them, the amendments thereto, by the State of Kansas, and the act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved 1st of July, 1862, and the several acts of Congress amendatory thereof, are engaged in constructing a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, and from Wyandotte, in the State of Kansas, to Fort Riley, in said State, and thence westwardly; and also a branch railway from the city of Leavenworth, in Kansas aforesaid, to its junction with the main line of the company's road east of Lawrence, as now located, and for the purpose of constructing said railway, beginning as aforesaid on the south side of the Kansas river, and at Wyandotte, and running thence westwardly on the north side of the Kansas river to such point west of the one-hundredth meridian, to which the grant in bonds from the United States, by virtue of the several acts of Congress passed in the aid of the company, extend," etc.

On the second day of October, 1876, the company executed and filed another mortgage, known as the funding mortgage. The opening declaration of this instrument is as follows:

"This indenture, made the second day of October, A. D. 1876, between *The Kansas Pacific Railway Company, a corporation existing under the laws of the State of Kansas,* hereinafter called the said company, of the one part, and William J. Lewis and Cyrus B. Burnham, both of Saint Louis, in the State of Missouri, hereinafter called the said trustees, of the other part."

On the first day of 1879, the Kansas Pacific Railway Company executed a mortgage, which recited and granted as follows:

"This indenture, made the first of May, A. D. 1879, between the Kansas Pacific Railway Company, hereinafter called the said company, of the one part, and Jay Gould and Russell Sage, both of the city and State of New York, hereinafter called the said trustees, of the other part: whereas, said company is a railroad corporation, created by an act of the Legislature of the Territory of Kansas, passed in 1855, under the name of the Leavenworth, Pawnee & Western Company, which name has since been duly changed, first to the 'Union Pacific Railway Company, Eastern Division,' and again to the 'Kansas Pacific Railway Company.'"

In the answer of the company it admits the existence of the Leavenworth, Pawnee & Western Railroad Company as late as 1864, in the allegation appearing upon the third page

of their answer, wherein they assert that "Congress itself di-
"rectly conferred and granted the necessary rights, powers and
"franchises upon the persons composing the Leavenworth,
"Pawnee & Western Railroad Company to become, and they
"did accordingly become, a corporation of the United States,
"with the same name, property, members and interests that
"they had in the *then existing organization.*" This amounts to an admission of the organization and existence of the corporation deriving its powers and franchises from the State of Kansas nine years after the passage of its charter; and as there appears in the record no averment that that corporation has ever ceased to exist, and as under the laws of the State of Kansas its existence could be terminated only by a lapse of time limited in its charter or by judicial forfeiture of its franchises to the State of Kansas, the court must presume that the corporation known as the Leavenworth, Pawnee & Western Railroad Company is still in existence.

Again, we charge in our petition that the Leavenworth, Pawnee & Western Railroad Company has existed under various changes of name ever since its creation and organization, first, as the Union Pacific Railway Company, Eastern Division, and lastly as the Kansas Pacific Railway Company, and is the same company created by, organized and existing under the franchises originally granted to the Leavenworth, Pawnee & Western Railroad Company.

To a suit by the State against this corporation thus described, and no other, the defendant has made a voluntary appearance. This in itself amounts to a clear and conclusive admission of its identity as a corporation of the State of Kansas. In the case of *Gulf Railroad Co. v. Shirley*, 20 Kas. 663, the court in its opinion says:

"But a party may not come into court and deny his own

"existence. He may deny his liability to suit, his power to "act, or responsibility for his actions; but *coming in*, he ad- "mits that he exists. So that when a bill of particulars is "filed, stating a cause of action against an alleged corpora- "tion, if the party upon whom service is made comes in and "pleads, and goes to trial as the *defendant sued*, there is no "need of the plaintiff's proving that it is the defendant and "that it exists. The defendant thus coming in has admitted "its own existence. The case of *Seaton v. C. R. I. & P. "Rld. Co.*, 55 Mo. 416, is exactly in point. In it the court "says: 'If a corporation appears to a suit, it cannot deny its "own existence. . . . But when the corporation appears "as defendant, such appearance is conclusive evidence of its "legal existence for the purposes of the pending case.' See "also *Hudson v. St. L. K. C. & N. Rly. Co.*, 53 Mo. 525; "*W. U. Tel. Co. v. Eyser*, 2 Col. 141; *M. C. D. Co. v. The "State, &c.*, 43 Ind. 236."

We had thought, in establishing the identity of this corporation as one purely of State creation and organization, to have quoted some extracts from its various briefs and pleadings in the appearances it had made in the State and Federal courts of Kansas, down to the date of its attempted consolidation. In all of these it has admitted, in as clear and explicit a way as in its other acts and doings hereinbefore adverted to, its existence as a Kansas corporation. Such excerpts would be merely cumulative, and would serve only to accentuate the fact which excludes the possibility of its being a Federal corporation, namely, the fact that it is a Kansas corporation.

Judge DILLON, in his Removal of Causes, 3d edition, page 69, says: "The settled rule now, is that a corporation "for all purposes of Federal jurisdiction is conclusively con-

"sidered as if it were a citizen of the State which created it, "and no averment of proof as to citizenship elsewhere is "competent or material."

From the foregoing statement of law and facts, it appears that the Leavenworth, Pawnee & Western Railroad Company was not endowed with existence, and the power to organize, or become a corporation, from the acts of Congress. These acts of Congress denominated it a corporation of Kansas, and a corporation chartered by Kansas. Further, that the State of Kansas never renounced control over the corporation, nor extinguished its jurisdiction by judicial forfeiture; that it is still a Kansas corporation, and owes its vitality wholly to the laws of the State of Kansas. If this be true, then the converse of that fact must also be true, namely, that it is not a "corporation other than a banking "corporation organized under a law of the United States." If this be true, that it is not a corporation other than a banking corporation organized under a law of the United States, then it is wholly immaterial whether it has a defense "arising under or by virtue of the constitution, or of "any treaty or law of the United States." If it has such a defense, it can only assert it by appeal from the decision of the Supreme Court of the State to the Supreme Court of the United States, but it cannot remove a cause under section 640 of the Revised Statutes.

V.

But we propose to argue that it has stated no defense arising under or by virtue of the constitution, or of any treaty or law of the United States. We might premise our argument by averring the law to be that if it does not appear in the record that it has a defense arising under the constitution or laws of the United States, or, to put it in another form,

if it does affirmatively and conclusively appear in the record that it can have no defense arising under the constitution and laws of the United States, then it is a matter of no moment, and will not aid in conferring jurisdiction upon the Circuit Court; that it is in truth and in fact a corporation other than a banking corporation organized under a law of the United States.

Our argument upon this head will be equally applicable to the other ground of removal, which is based upon the second section of the act of Congress of March 3, 1875, an act claimed to be an enlargement of the provisions of section 640, and extending the privilege of removal to both plaintiff and defendant in any suit arising under the constitution or laws of the United States. Under the act of 1875, as well as under section 640, the ground of removal is substantially the same.

In the case of *Gold Washing & Water Co. v. Keyes*, 96 U. S. 202, the court says in its opinion: "For the purpose of "the transfer of a cause, the petition for removal which the "statute requires, performs the office of pleading. Upon "its statements, in connection with the other parts of the "record, the court must act in declaring the law upon the "question it presents."

The case of *McGee v. Union Pacific Railway Company*, 2 Sawyer, 447, was a suit brought by McGee against the Union Pacific Railroad Company to recover damages for injuries received by plaintiff's wife, in the State court of Nevada. They sought to remove this case by petition and bond to the Circuit Court of the United States, stating that they had a defense arising under the constitution and laws of the United States. But it appeared that they had filed an answer, pleading, it is true, certain of the laws of the United States, and alleging a defense thereunder. The court exam-

ined the whole record, not treating the allegations of the petition as conclusive. The court says in its opinion: "It may "be truly said that a defense arises under a law of the United "States, when a correct decision upon the merits of the de- "fense depends upon the construction of that law. But it ap- "pears in this case, by the admission of counsel as well as by "the record, that the defense involves the construction of no "law of the United States. A correct decision upon its merits "depends entirely upon common-law principles, wholly inde- "pendent of any statute law. The jurisdiction of this court "depends upon the character of the defense as well as upon "the character of the party, and as the defendant has no de- "fense arising under or by virtue of a law of the United "States, there is a failure of jurisdiction, and the cause must "be remanded to the State court. It was suggested that there "was a doubt as to this being the proper stage in the case to "determine this question upon motion. There are no disputed "facts, and it clearly appears from the admissions of counsel "and the record—the answer filed—that this corporation has "no defense, as we construe the law, arising under a law of "the United States. As the question can never be presented "more satisfactorily than now, it would only cause unneces- "sary delay to postpone the decision of the matter until the "trial."

In the case of *Myers v. Union Pacific Railway Company*, 3 McCrary, 578, Mr. Justice MILLER of this court, sitting with Judge MCCRARY, who delivered the opinion, held that a suit brought by or against the Union Pacific Railway Company, a corporation formed under an act of Congress, as shown by the record in this case, is not necessarily a suit arising under the laws of the United States so as to be removed on that ground from the State to the Federal court. The court, by MCCRARY, J., in the opinion, says:

"That a suit by or against the Union Pacific Railway Company, a corporation formed in the manner disclosed in the record, is not necessarily a suit arising under the laws of the United States, so as to be removed on that ground from a State to a Federal court.

"In the present case the removal was sought upon the latter ground, and it appears from the record that it is based upon the single alleged fact that the defendant is a corporation organized under the laws of the United States. . . . It is necessary that the record should show affirmatively that the cause of action or defense arises upon the construction of, or upon a claim of right arising under, some law of the United States, or of a treaty, or of some provision of the constitution of the United States. A suit against the defendant corporation is not necessarily a case which arises under a law of the United States within the meaning of the removal acts. The question is not the same as that decided in *Osborne v. United States Bank*, 9 Wheat. 738. The question there decided was, whether Congress had power, under the constitution, to give Circuit Courts jurisdiction in suits against the United States Bank, irrespective of the subject-matter of such suits. The affirmative of this question was established. But there is no law of Congress authorizing the present defendant to remove a case brought against it into the United States Circuit Court on any other terms than those provided for all other persons and corporations. It is not provided that all suits in the State courts by or against the defendant may be removed. . . . I am authorized to say that Mr. Justice Miller concurs in these conclusions."

We have argued from section 640 of the Revised Statutes as if that provision of the law were still in force, and removals might be taken under it. There is, however, great reason to believe that Congress in passing the second section of the removal act of 1875 intended to, and did repeal the provisions of section 640. Section 640 would, if in force, limit and restrict the operation of section 2 of the removal act of 1875, as to a certain class of parties, which, as the removal act of 1875 is inclusive and sweeping in its terms, would be against both the letter and spirit of the last-mentioned act. This point will be more elaborately argued in another brief, filed in this court on behalf of the State.

VI.

Whatever may be the construction as to the requirements under section 640 to confer jurisdiction upon the Circuit

Court, there can be no doubt as to the plain import of the second section of the act of March 3, 1875, even though this court had not in numerous decisions construed its meaning. It is necessary to the removal, that the suit should arise under the constitution or laws of the United States. Under a liberal interpretation by this court, it has been held to be equally applicable to a defense arising under the constitution and laws of the United States. The language of the removal act of 1875 is declaratory of the provisions of the Federal constitution conferring jurisdiction upon courts of the United States, and as this element of jurisdiction was chiefly in the mind of the founders of the Government when establishing the Federal courts, this language has had frequent interpretation. When the cause of action embraced in the declaration or bill of complaint either affirms or denies the right or liability of the defendant under the constitution or laws of the United States, there can be no question as to the removability of the case. The defendant must necessarily, in meeting the exigencies of the suit, assert in his own behalf and for his own protection a principle or provision of Federal law. When the unavoidable tendency of a declaration or bill of complaint is to compel the defendant to assert a principle or provision of Federal law for his own vindication or protection, there can be, under the liberal construction of this court, as little doubt that a Federal question arises and is essential to a proper determination of the rights of the parties. But it is clear in both these cases, either if the plaintiff assert or deny a Federal principle, or the defendant urge the same sort of principle in his own behalf, that principle, to be efficient in conferring jurisdiction, must be one without which the plaintiff might not maintain his action or the defendant assert a complete defense. If, for instance, the plaintiff assert a right under a treaty of the United States, and the

defendant assert the same right under the same treaty, the case would not be removable, because there is no controversy between the parties—no conflict of rights between them which would require the construction or interpretation of a Federal statute for the proper and just solution of such controversy or conflict.

VII.

Having thus broadly stated the elements of jurisdiction as to subject-matter under the act of 1875, let us consider minutely the meaning of the language of that act in all respects. First, it is required that a suit to be removed must be a suit of a civil nature at law, or in equity. And under this head it is necessary to inquire, first, if this is a suit of a civil nature at law or in equity within the contemplation of Congress when it passed this act. In Kansas we have adopted a code of civil procedure, the object and purpose of which is to assimilate and simplify the forms of legal procedure. The distinctions of actions at law and suits in equity are abolished, and in their stead we have simply one general form of action, known as "a civil action." The essential ingredients of legal and equitable jurisprudence, however, are necessarily preserved, and legal and equitable relief are both administered by the same courts in the same action, under and in accordance with the principles of justice in force and application in States where the distinction is still preserved as to procedure.

Quo warranto was held and regarded as a criminal proceeding at common law. Such proceeding is not akin to a suit against citizens of a State to enforce a contract liability: it is the assertion of a sovereign attribute of the State. As the granting of corporate privileges is one of the highest exercises of the sovereign powers of the State, in no less

degree is the vindication of that power the assertion of a sovereign attribute in taking away the powers thus granted for misuser and non-user. When such a proceeding is instituted by the State, the judgment is in the nature of a punishment and a penalty for a violation of official or corporate duties. In some States, in addition to the judgment of ouster the corporation may be punished by a fine. This being the nature of the proceeding, it is essentially criminal. It being in a large degree similar to the exercise of the right of a State to punish for crimes committed within its jurisdiction, it was undoubtedly excluded from the Congressional intention in adopting the second section of the act of March 3, 1875, and is clearly within the jurisdiction of the State of Kansas alone.

The act of 1875, when it speaks of suits at law and in equity of a civil nature, refers, under a familiar rule of interpretation, not to the statute of any State, but to the common law.

In *Rice v. Railroad Company*, 1 Black, 375, the court uses the following language: "In the construction of the "laws of Congress the rules of the common law furnish a "true guide, and the same remark applies in the construc- "tion of statutes of a State, except in cases where the courts "of the State have otherwise determined."

The rule of construction is also stated in the following vigorous language of Mr. Chief Justice TANEY, in the case of *Charles River Bridge v. Warren Bridge*, 11 Peters, 545:

"Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted in every other case, civil and criminal, its rules for the construction of statutes, is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and by implication make the terms of a charter in one of the States more unfavorable to the public than upon

an act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception?"

The same rule is forcibly stated by Mr. Story, in his work on the Constitution of the United States, second edition, page 106, sec. 158.

The reasons which have impelled this court to adopt the common law as a system of jurisprudence by the aid of which to construe the laws of the Federal Government, have exceptional force in reference to acts relating to the jurisdiction of Federal courts. For if any other rule prevailed, and the Supreme Court were governed by State statutes as rules of construction, in this particular instance at least, the States would have power to limit or enlarge the jurisdiction of the Federal courts at their pleasure. An action which is clearly civil in its character, in its nature, in its origin, scope and object, could, by denominating it criminal within the State, preclude the court from acquiring jurisdiction of it. So, *e converso*, as in this case, by grouping actions of a criminal nature under the general term of civil actions, they could enlarge the jurisdiction of this court beyond the intent and purpose of Congress in conferring it.

The nature of *quo warranto* proceedings, as to whether criminal or civil, has been frequently the subject of consideration by the courts of this country and England. In *The People v. Jones*, 18 Wendell, 602, the court, by COWEN, Judge, says: "So far as these alterations are substantial, I "confess they appear to me to render the proceedings rather "more comprehensive, prompt and rigorous than they were "under the former practice; and therefore their criminal "aspect, so far from being softened into the milder features

"of a civil action, (by statute,) seems to be rendered more "distinct. *The People v. The President, &c., of the Manhat-* "*tan Co.*, 9 Wendell, 377, was a case upon one of these "informations, filed since the revised statutes took effect. "Yet Sutherland, J., agreed that the statute of double plead- "ing did not apply, and said that the proceeding was in "nature of a criminal case."

In *State v. Baker*, 38 Wis., p. 80, the court, through Chief Justice RYAN, says: "The jurisdiction conferred on this "court by the constitution is of informations in the nature "of *quo warranto* as substituted in modern times for a use "of the ancient writ itself, and as used when the constitution "was framed. This was a prerogative proceeding, *quasi* "criminal and *quasi* civil in its character, according to its "use, but always classed with criminal informations. The "imposition of a fine, though nominal, appears to stamp "upon it the nature of a criminal proceeding. The mode of "proceeding under this jurisdiction might be regulated by "statute, but the jurisdiction itself could not be defeated or "abridged. This is expressly recognized in *Attorney General* "*v. Messmore*, as it has always been held by this court. " . . . It was undoubtedly competent for the Legisla- "ture to give a *quasi* civil proceeding in such actions, but "not to abolish the *quasi* criminal jurisdiction vested in the "court by the constitution. This appears to us to be matter "of substance, not of form." See also *State v. W. & W. Rld. Co.*, 34 Wis. 213; *State v. McDaniel*, 22 Ohio St. 360, 361. See also Bacon's Abridgment, title, "Information;" *State v. Roe*, 2 Dutcher, 214.

In *Donnelly v. The People*, 11 Ill. 552, the syllabus of the court is as follows: "A proceeding by *quo warranto* is a "criminal prosecution, and should be carried on in the name "and by the authority of '*The People of the State of Illinois*,'

"and should conclude, 'against the peace and dignity of the "same.'" See *Wight v. People*, 15 Ill. 417; *People v. Ridgely*, 21 Ill. 66.

"The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive, even against the crown; which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the Court of King's Bench by the Attorney General, in the nature of a writ of *quo warranto;* wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only." (3 Blackstone, 263.)

It will be claimed that the status of this action, as to its being a suit of a civil nature, is determinable by the laws of Kansas, and that we, having abolished by statute the writ of *quo warranto* and the information in the nature of *quo warranto*, have extracted from this proceeding the element of its criminal nature.

The code of the State of New York did the same thing, and that provision of the code is construed in the case of *People v. Pease*, 30 Barbour, 591:

"By statute, writs of *quo warranto* and informations in the nature of *quo warranto* are abolished, and an action is given in the name of the people when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within the State, or any office in a corporation created by the authority of the State. (Code, secs. 428, 432.) The action under the code, although differing in some of the formula of procedure from proceedings by information or by writ of *quo warranto*, is nevertheless, *in substance, the same*, and is governed by all the rules which regulated the proceedings under the former practice. The proceeding, both now and formerly, was, and is, intended to try the right of the defendant to the office possessed by him."

See also *Attorney General v. The Utica Insurance Co.*, 2 Johnson's Chancery (N. Y.), 377.

We might say in conclusion, it therefore makes no difference that various States of the Union, and among them

Kansas, have modified this proceeding in its form. Its essential character remains exactly as it did at common law, and the modifications have simply served to relieve the ancient proceeding of its cumbrousness and cost. The proper query to be made by the court is: Whether Congress, whose acts are to be governed by the rules of the common law, and which, therefore, had in contemplation the provisions and rules of the common law in framing the particular statute under consideration, meant to oust the State courts of this peculiar jurisdiction, appertaining to the highest exercise of the State sovereignty, and confer the same upon the Federal courts?

In many of the decisions above cited, the analogy of *quo warranto* to criminal proceedings is suggested by reference to the facts that the proceeding is brought in the name of the State against one of her own corporations, presumably composed of her own citizens, to punish it for a violation of law committed within her own jurisdiction.

In some cases the State permits *quo warranto* proceedings to be brought either upon the relation of an individual, or by the individual himself, to obtain possession of an office from the enjoyment of which he is wrongfully withheld by another. In classifying this form of proceeding, the courts have denominated it civil, in contradistinction from the proceeding by the State on its own behalf against a corporation or an individual to recover the franchises or punish an usurpation, which latter are held uniformly to be in their nature criminal.

VIII.

In considering whether the suit arises under the constitution or laws of the United States, it is important to first determine what is the scope and purpose of the State's petition.

We have already, in the statement of this case, given a summary of the averments in the petition, and reduced the same to six plain propositions made by the State, charging violations of the laws of the State, for which the State prays that the franchises conferred by it may be forfeited. We shall, however, before considering these charges in the petition, briefly advert to the essential nature of *quo warranto* proceedings, and the exercise of the powers of the State by their aid.

"A corporation," says Chief Justice MARSHALL, in *Dartmouth College v. Woodward*, 4 Wheat. 636, "is an artificial "being, invisible, intangible, and existing only in contem- "plation of law. Being the mere creature of law, it posses- "ses only those properties which the charter of its creation "confers upon it, either expressly or as incidental to its very "existence."

A corporation is endowed with franchises. This court has defined the nature of franchises, in the case of *Bank of Augusta v. Earl*, 13 Peters, 519: "Franchises are special privi- "leges conferred by Government on individuals, and which "do not belong to the citizens of the country generally of "common right; and in this country no franchise can be "held which is not derived from the law of the State."

The conferring of corporate franchises upon a corporation is the establishment of a trust. The *cestui que trust* are the people, for whose benefit the State creates the corporation. The reservation of power of forfeiture to the State of all such grants for misuser and non-user, is based upon the principle that the franchise is a trust; that all the terms of the charter are conditions of the trust, and if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. All grants of corporate powers are therefore to be construed strictly, and can only be exercised in the

manner and under the forms and by the agents prescribed in the charter. (2 Kent, 298–299; 1 Black. Com. 485; 13 Viner. Abr. 511; 13 Pet. 587; 5 Wend. 211; 2 Term, 546; 4 Gill & J. 121.)

The right of such forfeiture, therefore, is for obvious reasons limited to the power granting such franchises, and can be rightfully exercised by no other power nor within any other sovereignty.

In the case of *Territory v. Lockwood*, 3 Wallace, 238, which was an action of *quo warranto* brought in the Territory of Utah to test the right to office of a judge appointed by the Federal Government, the court, by Mr. Justice SWAYNE, says:

"The writ of *quo warranto* was a common-law writ. In the course of time it was superseded by the speedier remedy of an information in the same nature. It was a writ of right for the king. In the English courts an information for an offense differs from an indictment, chiefly in the fact that it is presented by the law officer of the crown without the intervention of a grand jury. Whether filed by the attorney general or the master of the crown office, and whether it relates to public offenses or to the class of private rights specified in the statute of 9 Ann. Ch. 20, in relation to which it may be invoked as a remedy, it is brought in the name of the king, and the practice is substantially the same in all cases. Any defect in the structure of the information may be taken advantage of by demurrer.

"In this country the proceeding is conducted in the name of the State or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect.

"In *Wallace v. Anderson*, this court said, 'That a writ of *quo warranto* could not be maintained except at the instance of the Government, and as this writ was issued by a private individual, without the authority of the Government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question.' In the case of *The Miners' Bank v. United States*, on the relation of Grant, the information was filed in the name of the United States in the District Court of Iowa Territory. The sufficiency of the information in this respect does not appear to have been questioned. A State court cannot issue a writ of mandamus to an officer of the United States. 'His conduct can only be controlled by the power that created him.' The validity of a patent for land issued by the United States 'is a question exclusively between the sovereignty making the grant and the grantee.'

"The Judges of the Supreme Court of the Territory of Nebraska are

appointed by the President and confirmed by the Senate of the United States. The people of the Territory have no agency in appointing them and no power to remove them. The Territorial Legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the Territory to prosecute such an information as this would carry with it the power of a motion, without the consent of the Government from which the appointment was derived. This the Territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the States as to the Federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the Government of the Nation. We do not find that it has been delegated to the Territory. We think the demurrer was well taken."

In one of the cases cited by Mr. Justice SWAYNE, in the above opinion, *Field v. Seabury*, 19 How. 332, the following language appears in the opinion of the court: "But it is a "question [the right to avoid a grant] exclusively between "the sovereignty making the grant and the grantee."

Referring again to the case above quoted, (*Territory v. Lockwood*,) it appears that this court has declared and reaffirmed the principle that *quo warranto* cannot be maintained except at the instance of the Government. From this follow three propositions: First, that in maintaining this action against a particular corporation, reference could only be had to the franchises granted by the State in whose name the action was brought. Second, that in such action the State could only forfeit such franchises as it had granted. Third, that the charter, containing such franchises and the laws of the State applicable to the corporation, not inconsistent with nor in violation of its charter, contains the only source of knowledge from whence to determine the limitation of the powers of the corporation, or the violation of its duties, upon which to base a judgment of forfeiture. The State cannot, if she would, transcend this impassable boundary to her rights. It can only bring this proceeding against a corporation created

by her laws; it can only forfeit such rights and such privileges and franchises as are conferred by her laws. If the petition in this case seeks to do more than this, such excess of language in it will be treated by the court in which this action was originally brought, as mere surplusage.

This court has held, in the case of *Baltimore & Ohio Railroad Company v. Harris*, 12 Wallace, 65, that a railroad created by a State may by license and a rule of comity, extend its road and its business into other States. In such a case as that, could the State of West Virginia, for instance, forfeit the franchises of the company granted by the State of Maryland? Most assuredly it could not. All she would have power to do for a violation of her laws would be to take away the license or permission to transact business granted within the State. Of its sovereign right and privilege to do this, there can be no question, if upon proper inquiry it were found that the company had violated the laws of West Virginia, or the conditions upon which the license was granted.

The Missouri, Kansas & Texas Railroad Company was organized by the State of Kansas. It has extended its road into the State of Missouri. The rights that it has in either State are subject to the laws and jurisdictions of those States respectively. It is therefore clear that the State of Kansas has control only over what she granted, and the right to exercise that control depends entirely, and is to be supported or overthrown entirely, by reference to the conditions and terms of the grant as existing in the letter of her own law.

In the case of *Hart v. B. H. & E. Rld. Co.*, 40 Conn. 524, which was a suit in equity to dissolve a corporation, the court says:

"It is insisted, in the first place, that the court below had no jurisdiction over the respondents, or over their property, on account of the decree

in bankruptcy which has been passed against the respondents by the District Court of the United States in the neighboring State of Massachusetts. But we think the bankruptcy proceedings cannot operate to impair the right of this State to dissolve a corporation created by the laws of this State. What this State gave in this respect, this State can take away, notwithstanding the United States may have acquired jurisdiction over the property of the corporation sought to be dissolved. The jurisdiction of the two governments is separate and distinct. The one may have the right, by instituting proceedings in bankruptcy, to wind up the affairs of a corporation, and distribute its effects among its creditors; but it belongs to the other to annul the charter which it gave; and its right in this respect must be exclusive and supreme."

See also *O. & M. Railroad Co. v. Wheeler*, 1 Black, 297; *Society, &c., v. New Haven*, 8 Wheat. 464; *People v. Gospel Society*, 1 Payne, (Circuit Court,) 652; *Barclay v. Talman*, 4 Edw. Chan. 126.

We have alleged the creation of the defendant company by our laws, and the conferring of certain franchises upon the company, and its continued existence and enjoyment of those franchises under and by virtue of our laws. As to whether this averment is well founded, can only be determined by reference to and construction of our laws.

We allege the abandonment and surrender and non-user of these franchises. This is purely a question of fact, and if it involves any principle of law, such principle can be founded only upon the duties and obligations created by the laws of Kansas.

We have alleged as a third ground of forfeiture, that it has violated the 14th section of its charter in failing to make certain reports therein required to the Secretary of State. If it owes any duty or obligation to the State of this nature, it owes it under and by the terms of this statute which we allege to be its charter.

Our fourth allegation is, that it has failed to keep its general offices within the State of Kansas. The requirement that it shall so keep its offices is contained in the statutes of

the State of Kansas heretofore quoted, and not elsewhere. If it owes this duty at all, it owes it under and by virtue of this statute.

Our fifth charge against the corporation is, that it has failed to designate some person in each county through which its road runs upon whom service of process against it may be had. This is a requirement of Kansas law, and its failure in this regard, if it has failed, is referable solely to the laws and jurisdiction of Kansas.

Our sixth charge against the company is, that it has consolidated with the Union Pacific Railroad Company and the Denver Pacific Company, in violation of the laws of Kansas; not in violation of the laws of the United States, but of State laws.

For the purpose of the case against the Kansas Pacific Company, it is immaterial whether such consolidation is lawful under the laws of the United States, or not. If, so far as this company's participation in such consolidation is concerned, the consolidation was unlawful, in violation of the duties and obligations it owed to the State, and incompatible with the laws of the State, then it becomes a ground of forfeiture of such franchises as the State may have given it, and of which it may be in the enjoyment after its unlawful act. In this regard the Federal statutes need no construction; their terms and requirements are not denied nor sought to be impaired by the State in this proceeding. She is dealing only with her own; is vindicating only her own laws affecting matters within her own jurisdiction, and in no wise seeking to impair or to even question the supremacy of the Federal Government within its jurisdiction.

We have, therefore, by our petition, limited rightly the scope of this inquiry. We have confined it exclusively to matters of State cognizance, State jurisdiction, to be sup-

ported and illuminated only by the construction of State laws. We have, therefore, placed around this inquiry an impassable boundary; we have put explicit charges, to which must be given explicit answers. Any evasion, circumlocution, or suggestion of collateral inquiry, has been completely precluded, and there is nothing in the petition upon its face which calls for or admits of a recourse to the constitution or laws of the United States. So far as this petition is concerned, then, this suit does not arise under the constitution or laws of the United States.

IX.

We come now to consider the answer, and first of what, under the rules of pleading governing this form of action, the answer should be, and what in this particular case is issuable. We shall presently consider how much of the defendant's answer is pertinent, and how much mere surplusage, asserting matters not brought in controversy by the petition, and constituting no defense to the charges of the State.

The purpose of a *quo warranto* proceeding is to judicially declare a forfeiture of an office, or corporate franchise which has already been forfeited by the misuser or non-user of the incumbent or corporation. Matters occurring subsequent to the commencement of the suit cannot be considered in reference to it. The forfeiture already in contemplation of law exists by force of the acts of the corporation. The franchise remains in the hands of the corporation by sufferance of the State alone. The writ, information or action of *quo warranto* is instituted for the purpose of ousting the corporation from the exercise of the franchise which it has forfeited, as usurpers of the same.

Section 40 of chapter 23 of the General Statutes of 1868, being the laws of Kansas concerning private corporations, is

as follows: "SEC. 40. A corporation is dissolved—*first*, by "the expiration of the time limited in its charter; *second*, by "the judgment of dissolution rendered by a court of compe- "tent jurisdiction." Manifestly the scope of the inquiry in such proceedings must be limited to narrow bounds. When a corporation is thus brought by the State to confront charges which warrant the forfeiture of its franchise, it is limited by the law to two pleas. It must either disclaim the user of the franchises, or justify its acts charged to be a misuser or non-user of the same.

In the case of the *Ill. Mid. Rly. Company v. The People*, 84 Ill. 427, the court says: "Where a party is charged by "information in the nature of *quo warranto* in the name of "the people of the State, with having usurped powers and "franchises, and with exercising the same without authority "of law, he must either justify, or disclaim having done so."

Angell and Ames on Corporations, section 756, states the doctrine as follows: "To a writ of *quo warranto*, or an in- "formation in the nature of one, the defendant must either "disclaim, or justify, and the State is bound to show noth- "ing."

In the case of *Clark v. The People*, 15 Ill. 217, which was an action to recover an office, the court says: "In a "proceeding by information in the nature of *quo warranto*, "the defendant must either disclaim, or justify. If he dis- "claims, the people are at once entitled to judgment; if he "justifies, he must set out his title specially."

See also *The State v. Utter*, 14 N. J. L. 84; *State v. Ashley*, 1 Pike (Ark.), 553; *State v. Harris*, 3 Pike (Ark.), 372; *People v. Crawford*, 28 Mich. 88; *People v. Mayworm*, 5 Mich. 148.

The common law is in force in Kansas in all respects except as modified by statute. The statutes of Kansas are silent

upon what constitutes a defense to a proceeding in *quo warranto*. The effect of a disclaimer is stated in the case of *State v. Barron*, 57 N. H. 502: "At common law, when the "respondent disclaimed, judgment was rendered immediately "for the crown." See also cases last above cited.

If the respondent justified, judgment was rendered for the allowance of the franchise. The respondent in a proceeding of *quo warranto* cannot both disclaim and justify in the same pleading.

In the case of *Ill. Mid. Rly. Co. v. The People*, above cited, the court says: "The second amended plea to which a de- "murrer was sustained does neither. It is neither a com- "plete plea of justification, nor a full disclaimer. *Such pleas* "*must be consistent*, and not allege defenses repugnant to each "other. This one contains some matters tending to show "justification and others tending to show a disclaimer. In "that respect the defenses set up are repugnant and incon- "sistent with each other, and for that reason the plea is bad." See also *Clark v. The People*, 15 Ill. 217.

The answer in this case, as we have before stated, is drawn palpably more with a view to force jurisdiction upon the Federal court than to frankly meet the issues tendered by the State. In the latter respect it is both disingenuous and evasive. They disclaim, first, that they are a corporation created, organized or existing under the laws of the Territory of Kansas. They deny that their railway was ever authorized, constructed, managed or operated under the charter mentioned in the petition or any charter or legislation of the Territory or State of Kansas.

Their disclaimer therefore amounts in brief to this, that they have ever exercised or enjoyed any of the liberties, privileges or franchises belonging to the company which the State has created and conferred franchises upon, and which

it has brought into court by this proceeding. This is a question of fact, upon which the State may join issue, and if resolved in favor of the company, is in itself a complete defense. The company in stating this defense had no need to state more than that they had never enjoyed nor exercised the franchises which the State was seeking to forfeit for abuse. Nor can it state anything in addition to this defense which would be pertinent to it. The fact is enough, and anything added to this defense by way of justification of the charges of the State would be repugnant to it, redundant, and should be stricken out on motion as surplusage. If it has no charter from the State, the plea of a charter from the United States, another State of the Union, or from England, would add neither weight nor force, nor give the slightest added value to this complete defense. Certainly, therefore, upon an issue of this sort framed with the State, there could be no matter of Federal cognizance. See *Att'y Gen'l v. Michigan State Bank*, 2 Douglas (Mich.), 359; Gould's Pleadings, 157; Stephen Pleadings, 350.

The same rule is affirmed by Chitty, who says that "In "general, whatever circumstances are necessary to constitute "the cause of complaint or ground of offense, must be stated "in the pleadings, and all beyond is surplusage." (1 Chitty Pl. 246.)

But the company was not content with this defense. It makes it in its answer only in terms to abandon and repudiate it.

It admits the existence of the corporation sued, and its organization nine years after its creation by the Kansas charter.

There appears on the third page of the answer this averment, which we reprint for present convenience: "Congress "itself directly conferred and granted the necessary rights,

"powers and franchises upon the persons composing the "Leavenworth, Pawnee & Western Railroad Company, to "become, and they did accordingly become, a corporation of "the United States, with the same name, property, members "and interests that they had in the *then existing organization.*" This statement in the answer is an admission that at the date of the passage of the act of 1864, the Leavenworth, Pawnee & Western Railroad Company, a Kansas corporation, and the one which we have sued, was organized and in existence.

On page 4 of the answer, subdivision 3d, appears this additional statement: "This defendant says if it be true and "shall be held that the effect of the said acts of Congress "was not as aforesaid to confer distinct and independent "corporate capacity upon the Leavenworth, Pawnee & West-"ern Railroad Company, or its members, as a corporation of "the United States, under the name and designation of the "Leavenworth, Pawnee & Western Railroad Company, that "nevertheless the intent and legal effect and operation of the "said acts of Congress, in connection with the legislative "acts of the Territory and State of Kansas, were directly to "grant and to confer upon the said railroad company, dis-"tinct, independent and plenary power and authority imme-"diately derived from the Congress of the United States, "and not from the Territory or State of Kansas, to construct "and operate the railroad, and the only railroad that was "afterwards built and operated," etc.

As we have said, it would have been sufficient to have disclaimed the user of corporate franchises, and it is totally immaterial whether either of these wild and incoherent statements are true. But if any meaning can be extracted from them, it is that the defendant is in doubt as to the truth of the disclaimer which it makes positively in the very first paragraph of its answer, and they can serve no intelligible

purpose as pleading except as admissions that it does exist, and is operating its railroad under the laws of Kansas.

On page 18 of the answer, subdivision 6, the defendant further says that "if it originally was incorporated by the "act of the Legislature set forth in plaintiff's petition, as "claimed by the plaintiff, it became entitled, by virtue of "the acts of Congress hereinbefore set forth, to consolidate "with the said companies as aforesaid, and that further au- "thority to thus consolidate, even it were incorporated by "the Territory of Kansas, was granted by an act of the State "of Kansas, approved March 5th, 1862, entitled 'An act "relating to railroad companies.'"

On page 19 it further says: "That the said Leavenworth, "Pawnee & Western Railroad Company was authorized to "make said consolidation by an act of the Legislature of the "State of Kansas, passed in 1865."

On page 25 of the defendant's answer, subdivision 10, it denies "that it has violated the laws of the State of Kansas, "made and enacted for its regulation, in that it no longer "keeps a general office for the transaction of its business "within the State of Kansas, as stated in said petition."

On page 26 of its answer, subdivision 10, it enters into a rambling and equivocating series of excuses for not complying with the statute of Kansas requiring it to keep its general office within the State, and that it has established within the limits of the State the usual offices for the transaction of business, so as to give the State no just cause of complaint and of violating her laws.

On page 30, subdivision 10 of the answer, it "denies that "it has violated any of the laws of the State of Kansas appli- "cable to it in respect to keeping general or other offices "within the State."

On page 33 of the answer, subdivision 12, it justifies the

charge against it in the petition, of not providing a person in each county through which the road runs, on whom service of process against the company may be made, by saying that it has designated such persons in each county whose authority to accept process has not been revoked since the consolidation.

All these averments, although flatly inconsistent with the disclaimer of the user of any franchises derived from the State, amount to admissions that it is amenable to the laws of the State in all respects in which it is charged, and that it is in existence now the same as it was in 1864, to render obedience to those laws and the requirements of its charter.

The defendant has, in contradiction of its disclaimer, and in averments which are clearly repugnant to it, proceeded in this answer to take issue with the State upon every charge that it has made, and to justify it. Where such justification amounts to a mere denial of the truth of the charge and tenders an issue of fact to the State, there is no Federal question raised by the answer. This is too plain for argument. The offenses charged are against the laws of the State, and it does not deny nor can it be heard to deny the existence of those laws. In addition to denying the offenses charged, it has, in justification of one charge of the petition, pleaded a waiver by the State by her acts to preclude the forfeiture. This charge is a disregard and disobedience of the fourteenth section of the act of 1855, and the justification amounts to an admission of its corporate existence under its charter, and to a denial of its former disclaimer. The pleadings, however, leave it an issue of fact, to be hereafter determined between the State and the defendant. Certainly no act of Congress can be pleaded as an excuse for a non-compliance with its charter. No act of Congress can add to the affirmative defenses in its answer, which may be

arrayed under the head of justification. The acts of Congress pleaded in this answer are only pleaded in support of its disclaimer. It says in substance that it has no charter from the State of Kansas, because it has a charter from the Government of the United States. It owes no duties to the State of Kansas, because it owes all its duties to the United States. It says that it has never used any franchises granted by the State of Kansas, because all its franchises were granted by the United States; and to sustain its disclaimer it cites the act of Congress of July 1st, 1862, and the amendatory acts. A disclaimer needs no law of either the State or the United States for its support. If it has never used franchises of the State of Kansas, there are none to forfeit; if it never has had an existence under a charter of the State, the State cannot punish it for a disobedience of that charter. If it is not amenable to the laws of Kansas, the laws of Kansas are powerless against it. No Federal statute can strengthen its position in this respect, and the defense would be just as perfect, so far as this adventitious claim is concerned, if they asserted a grant of power from the King of Spain, or His Majesty of the Sandwich Islands.

It therefore sufficiently appears from the analysis of this answer, that the defendant has sought both to fully disclaim and fully justify. Either defense, if established, is a complete one to the petition; though both appearing in the same answer, the plea taken as a whole might be held to be bad as being inconsistent and repugnant. But we are not here seeking to declare these defenses bad, or to compel an election by the company upon which one it shall stand. For the purposes of this argument, we may concede that this double pleading is permissible, and that a full justification and a full disclaimer may stand in the same record, and the defendant be permitted to rely upon both. But we contend

that under neither does any Federal question arise. If the justification is supported, it will be by proof of obedience to State laws made with strict reference to a requirement of such laws. If the disclaimer be established by proof of non-user of franchises granted by the charter or the laws enacted by the Territory or State of Kansas, such defense can be neither aided nor limited by the construction of the constitution or laws of the United States.

We have thus gone fully into the record of this case, to show that neither under the removal acts of 1875 or 1868 can any jurisdiction be supported in the Federal court by the necessary construction of the Federal constitution or statutes. It will be contended that the pleading of these laws and the mere assertion that these laws are relied upon as a defense, is sufficient appearing in the record to sustain the jurisdiction of the court. But this is not the construction put upon their powers and jurisdiction by the Federal courts themselves. This court in its rulings has carefully avoided permitting the assumption of any, unless undoubted jurisdiction by the Circuit Courts, and in respect of the subject-matter of the suit has excluded all cases where the proper determination of the controversy does not depend necessarily upon the constitution or laws of the United States. And to the end that the Federal jurisdiction may not be abused, either by the consent of parties or a trick of pleading, they have regarded it as their duty to look into the whole record of a case, to discover whether the Federal question fairly arises and is inescapable, or whether it is merely incidental to the cause; and in the latter event they have consistently repelled the claim of jurisdiction.

In the case of the *Gold Washing and Water Company v. Keyes*, 96 U. S. 203, this court, by Mr. Chief Justice WAITE, says:

"Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of this rule, we think that the record in this case is insufficient, and that the Circuit Court did not err in remanding the cause."

See also *Ins. Co. v. Pechner*, 95 U. S. 185; *Amory v. Amory*, 95 U. S. 187; *Mahone v. M. & L. Rld.*, 111 Mass. 74, (opinion by Mr. Chief Justice GRAY, now a member of this court;) *Donohoe v. Mariposa Land and Mining Co.*, 5 Sawyer, 153; *Goddard v. Bosson*, 21 Kas. 144.

In the numerous decisions of this court which discuss the doctrine of what constitutes a question arising under the constitution and laws of the United States, the most liberal one in favor of the jurisdiction of this court is that of *Railroad Co. v. Mississippi*, 102 U. S. 135. The language of the court in that case is as follows: "That a case in law or "equity consists of a right of one party as well as of the "other, and may properly be said to arise under the consti- "tution or a law of the United States whenever its correct "decision depends upon the construction of either; that "cases arising under the laws of the United States are such "as grow out of the legislation of Congress, whether they "constitute a right, or privilege, or claim, or protection, or "defense of the party in whole or in part by whom they are "asserted."

Taking this very broad view as our rule of guidance, let us ask first, does the petition of the State grow out of the legislation of Congress? We think it is too clear for argument, that it does not. Neither does it assert a right, or priv-

ilege, or claim, growing out of the legislation of Congress either in whole or in part. It is simply a suit by the State against one of her own corporations to recover franchises which were the subject of the grant of her own laws.

Applying the same rule to the defense, does Congress, we might go further and say, *can* Congress confer any right, or privilege, or claim, or protection, or defense, in whole or in part, to this just proceeding by the State? The State in its petition not only asks for nothing as against the United States, but it carefully affirms, asserts and guards any right the United States might have. She would not infringe a right granted by the United States if she could, and she could not if she would. Within the domain of power with which she is vested by the constitution of the United States, Kansas is as supreme as the United States themselves. The United States cannot abridge her right to do that which she is seeking to do under this act. By the exercise of this sovereign act, she is doing nothing against which the constitution or laws of the United States furnish any protection or defense of this corporation in whole or in part. Until a right, or privilege, or claim, or protection, enacted or guaranteed by the laws or the constitution of the United States is sought to be infringed by a State or citizen, there is nothing for the jurisdiction of the Federal court to operate upon. Because there is nothing in this proceeding, therefore, which could by any possibility admit of such a defense, the Circuit Court of the United States can claim no jurisdiction.

In the case of *Gold Washing and Water Co. v. Keyes*, 96 U. S. 202, the court, by Mr. Chief Justice WAITE, very clearly states the principle upon which jurisdiction rests in such a case as this, as follows:

"In this petition, the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that

can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States specifically enumerated, as well as the preëmption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes.

"Certainly, an answer or plea containing only the statements of the petition, would not be sufficient for the presentation of a defense to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine."

In the case of *Dowell v. Griswold*, 5 Sawyer, 39, the court, by DEADY, J., says:

"The allegation in the complaint, that the cause of action arises under the laws of the United States, and necessarily involves the construction of certain acts of Congress, is only a conclusion of law. Unless the facts stated show how it arises under such laws, the allegation is insufficient to confer jurisdiction by reason of the character of the cause, without reference to that of the parties. . . .

"But it is also alleged, as a ground of jurisdiction, that the trial of this action will 'necessarily involve' the construction of the acts of Congress aforesaid. Whether this is so, or not, at this stage of the proceedings cannot be told. But in my judgment an action cannot be said to arise under a law of the United States simply because its construction in some respect is or may be incidentally involved in the trial of it."

In support of this doctrine, see *Dubuclet v. Louisiana*, 103 U. S. 550; *McGee v. U. P. Rly. Co.*, 2 Sawyer, 447; *Albright v. Tease*, 106 U. S. 613; *Hoadley v. San Francisco*, 94 U. S. 4; *Barron v. Hunten*, 99 U. S. 80; *State v. Bowen*, 8 Richardson, (S. C.), 384; *Gold Washing and Mining Co. v. Keyes*, 96 U. S. 202.

X.

There is another reason why this case and the one argued with it, namely, *The State of Kansas v. Ames, et al.*, may not be removed into the Circuit Court of the United States, which

is founded upon the limitations affixed to the original grant of judicial power by the constitution of the United States and the provisions of the Judiciary Act, passed in furtherance of that power. We will state this reason briefly, because it is argued elaborately and at length in other briefs that will be filed on behalf of the State. It is that the spirit of the 11th amendment to the constitution of the United States and the letter of the 9th, 11th and 13th sections of the Judiciary Act forbid the acquirement of original jurisdiction by any Federal court except the Supreme Court of the United States, when the State is a party, and the suit is against a citizen of another State or against foreign citizens or subjects. This restriction rests in the construction of the powers of Federal courts to be derived not only from the constitutional provisions and the laws above referred to, but from the intention of the framers of the Government in creating this branch of the Federal power, and affixing limits to its exercise. These intentions are to be gathered from the provisions of law referred to as illustrated by the debates of the Constitutional Convention and of Congress. The soundness of this view of the Federal judicial power is well illustrated by this case, wherein it appears to be necessary to preserve the equipoise and sustain the sovereignty and dignity of the State, when asserting in her own tribunal, by this proceeding, one of the highest and most sacred of her prerogatives.

We respectfully invite the attention of the court to the argument above referred to, in another brief.

XI.

In conclusion, and for the convenience of the court, we summarize the points which we have urged in the foregoing brief why the judgment of the court below remanding this case should be affirmed. They are as follows:

First. The court can have no jurisdiction by virtue of section 640 of the Revised Statutes, because the defendant is not a Federal corporation, and because, having answered, it has failed to state a defense arising under the constitution and laws of the United States.

Second. The Federal court can have no jurisdiction under the second section of the removal act of March 3, 1875, because it appears from the whole record that the suit does not arise, either from the cause of action of the State, or the defense of the railroad company, under the constitution and laws of the United States, or a treaty made or which shall be made under their authority.

Third. That this proceeding is not a suit of a civil nature at law or in equity within the meaning of Congress in the adoption of the removal act of March 3, 1875.

Fourth. That this being a suit instituted by a State against a corporation, and the State being a party, there is no jurisdiction in any Federal court to try or determine the same except the Supreme Court of the United States.

XII.

Upon the foregoing brief and argument, therefore, we submit this case with the assurance that the novel questions presented will receive just and careful consideration, and that the court, in asserting and protecting the jurisdiction conferred upon the Federal tribunals by law, will be no less solicitous to vindicate and uphold the dignity and sovereignty of one of the States of the Union.

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Attorney General.

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A. A. HARRIS,
Of Counsel.

IN THE SUPREME COURT

OF THE UNITED STATES.

THE STATE OF KANSAS,
EX REL. W. A. JOHNSTON, AS ATTORNEY GENERAL,
vs.
F. L. AMES, ET AL.

STATEMENT OF THE CASE.

ON the 12th day of July, 1883, the State of Kansas began its suit against the defendants by filing a petition in *quo warranto* in the Supreme Court of the State of Kansas, as it is brief, we herewith insert in full for the convenience of the court:

IN THE SUPREME COURT, STATE OF KANSAS.

The State of Kansas, *ex rel.* W. A. Johnston, as Attorney General of the State of Kansas, Plaintiff,
vs.
F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the Board of Directors of the Union Pacific Railway Company, Defendants. } 2970.

PETITION.

To the Honorable Judges of the Supreme Court of the State of Kansas:

W. A. Johnston, Attorney General of the State of Kansas, who sues for the said State in this behalf, comes here before the Judges of the Supreme Court of the said State, on the —— day of —— A. D. 1883, at the July term of said court for the State of Kansas, and gives the said court here to understand and be informed, that F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the Board of Directors of the Union Pacific Railway Company, do now, and have since Janu-

ary 24, 1880, used, and still do use, without any warrant, charter or grant, the following liberties, privileges and franchises, viz.: That of being a railroad company, to use, operate and enjoy, and to receive the tolls, issues, profits and benefits derived from the operation and use of the Kansas Pacific Railroad, being a line of railroad beginning at Leavenworth, in the State of Kansas, and extending in a general westerly direction, by the way of the Fort Riley military reservation, to the city of Denver, in Colorado, and beginning at the State line of Kansas, at a point near the junction of the Missouri and Kansas rivers, and running west to a junction with said line, at a point near the city of Lawrence, Kansas; which said line and lines of railroad, with all their properties, equipments, easements, subserviences, privileges, rights, liberties and franchises were, prior to the said 24th day of January, 1880, used, occupied, controlled and enjoyed by the Kansas Pacific Railway Company, which said Kansas Pacific Railway Company derived its right to so use, enjoy, employ and exercise the same, under an act passed in the year 1855, at a session of the Legislature of the Territory of Kansas, which act was entitled "An act to incorporate the Leavenworth, Pawnee & Western Railroad Company," and the further act passed by the Legislature of the Territory of Kansas, in the year 1857, at a session of said Legislature, supplemental to said act of 1855, entitled "An act supplemental to an act entitled 'An act to incorporate the Leavenworth, Pawnee & Western Railroad Company,'" of all of which liberties, privileges and franchises aforesaid, the said individuals, F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the Board of Directors of the Union Pacific Railway Company, during all the time aforesaid, have usurped, and still do usurp upon the said State, to her great damage and prejudice. Whereupon the said Attorney General prays the advice of the said court in the premises, and due process of law against the said individuals, F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, calling themselves the Board of Directors of the Union Pacific Railway Company, in this behalf to be made to answer to the said State by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid; and that upon a due hearing hereof, that said defendants, and said pretended railroad company, be adjudged to have unlawfully and wrongfully usurped and appropriated the rights, liberties, privileges and franchises aforesaid, and to be wrongfully and unlawfully using, enjoying and exercising the same, and that they be ousted therefrom.

W. A. JOHNSTON,
Attorney General of the State of Kansas.

J. S. BLACK,
W. H. ROSSINGTON,
A. A. HARRIS,
GEO. S. GREEN,
Of Counsel.

At the November session following of the Supreme Court, the defendants voluntarily appeared to this petition, and filed an answer. At the same time the Government Directors of the Union Pacific Railroad Company, appointed by the President under the act of Congress, appeared, and moved to be made parties in a motion, which will be found printed at length in the brief of The State against the Kansas Pacific Railway Company. The motion was granted by the court, in the following order:

The State of Kansas, *ex rel.*, Plaintiff,
vs.
F. L. Ames, *et al.*, Defendants. } No. 2970.

And now, on this seventh day of November, 1883, this cause coming on to be heard on the written application heretofore filed by Geo. G. Haven, for himself, Isaac H. Bromley, Colgate Hoyt, A. L. Conger and Watson Parrish, for an order to be made by this court in this cause, making them parties defendant in said cause, and that they be permitted within fifteen days to file their answers therein as Government Directors, so called, of the Union Pacific Railway Company, J. P. Usher and A. L. Williams appeared for said motion, and W. A. Johnston, Geo. S. Green, A. A. Harris, and W. H. Rossington, appeared for the plaintiff. The said motion was argued by counsel, and on consideration it was by the court ordered that the said Geo. G. Haven, Isaac H. Bromley, Colgate Hoyt, A. L. Conger and Watson Parrish be made parties defendant therein, with leave to answer said plaintiff's petition; to which ruling of the court the said plaintiff by its counsel then and there duly excepted.

Thereupon the defendants filed the following petitions for removal into the Circuit Court of the United States:

IN THE SUPREME COURT, STATE OF KANSAS.

The State of Kansas, *ex rel.* W. A. Johnston, as Attorney General of the State of Kansas, Plaintiff,
vs.
F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, (calling themselves The Board of Directors of the Union Pacific Railway Company,) Defendants.

PETITION FOR REMOVAL TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

To said Supreme Court:

I. Your petitioners, F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, S. H. H. Clark, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, Augustus Schell, and John Sharp, the defendants above named, respectfully show to this honorable court, that the matter and amount in dispute in the above

entitled suit exceeds, as to each of them, exclusive of costs, the sum or value of five hundred dollars.

They disclaim and deny that they have ever pretended to be operating or in any way or manner controlling the railroad formerly known by the name of the Kansas Pacific Railway, other than as part of the Board of Directors of the Union Pacific Railway Company, hereinafter mentioned. And your petitioners aver that they were at the time of the commencement of this suit, and still are, with the exception of the said Scott and the said Eckert, whose terms have expired, Directors of the Union Pacific Railway Company, elected by the stockholders thereof, and that said railway company is a corporation created and existing under the laws of the United States.

And your petitioners further aver that pursuant to and by the authority of the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1st, 1882, and the several acts of Congress amendatory thereof and supplemental thereto, the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, were, by articles of agreement duly executed by said companies January 24th, 1880, consolidated under the name of the Union Pacific Railway Company. That said articles were then filed in the Department of the Interior at Washington, and from that time said consolidated company has been known and recognized in all the departments of the Government of the United States as a corporation duly existing under the laws of the United States, created under the acts of Congress aforesaid, and for the use and purposes mentioned in the title and body of said act of July 1st, 1862, and the amendments thereto.

Your petitioners aver that the Union Pacific Railroad Company was incorporated and existing under said act of July 1, 1862; that the Kansas Pacific Railway Company was originally authorized to be incorporated under the name of the Leavenworth, Pawnee & Western Railroad Company, by a law of the Territory of Kansas passed in 1855, and afterwards assumed and was known by the name of the Union Pacific Railway Company, Eastern Division, and its name was by authority of joint resolution of Congress, March 3, 1869, changed to that of the Kansas Pacific Railway Company; that said company, by virtue and authority of the acts of Congress aforesaid, constructed its railroad from Leavenworth to Lawrence, and from the eastern terminus in Missouri on the south side of the Kansas river, as fixed by said acts of Congress, to Lawrence and from there to Denver, the entire line being within the State of Missouri and the bounds of the former Territory of Kansas, part whereof is now in the State of Kansas and part in the State of Colorado; that the Denver Pacific Railway and Telegraph Company is the same company mentioned in the act of Congress entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its junction with the Union Pacific Railroad, to the Den-

ver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado," approved March 3, 1869.

And your petitioners further aver that all their actings and doings mentioned and referred to in the petition of plaintiff in this suit have been and are under and by virtue of the authority of Congress conferred upon said companies by said acts whereby the Union Pacific Railway Company became a corporation, which your petitioners aver is a lawful corporation, and they aver that they are lawful and duly constituted members of the Board of Directors thereof, and constitute said board, with the exception of the said Scott and the said Eckert, whose terms of office have expired, their successors being Charles Francis Adams, jr., of Massachusetts, and Andrew H. Green, of New York, and with the exception of the Government Directors.

Your petitioners further show to this honorable court that this is a suit of a civil nature, commenced in and now pending in this honorable court; and that the amount in dispute exceeds, as to each of them, the sum or value of five hundred dollars; and that the same is a suit arising under the laws of the United States, to wit, under the aforesaid act of Congress of July 1, 1862, and various acts of Congress amendatory thereof and supplemental thereto; and that its decision involves the true and correct construction of the said laws of the United States, and the rights, titles and obligations of your petitioners thereunder. Your petitioners also aver that they have a good and sufficient defense thereto under the constitution and laws of the United States. Your petitioners state that the real and substantial dispute, controversy and question in this cause is the rightful power and authority of the three railroad companies above named to consolidate or unite their respective organizations under the said acts of Congress above mentioned and the effect of such union and consolidation, and that the decision of this dispute and controversy necessarily involves the true construction and effect of the said acts of Congress, and the right and titles of your petitioners thereunder. Your petitioners state that the statutes of the Territory and State of Kansas, and the said acts of Congress, and the said consolidation and acts done thereunder, create in them and in the said Union Pacific Railway Company, and in the several constituent companies, vested rights which are in controversy in this suit, given by contract which cannot lawfully be impaired by the State; and that this cause is one arising under the constitution and laws of the United States, and the defense thereto is one also arising under the constitution and laws of the United States.

II. Your petitioners state that at the time of the commencement of this suit, and at this time, the said Union Pacific Railway Company was and is a corporation other than a banking corporation organized under the laws of the United States, to wit, under the aforesaid act of Congress, approved July 1, 1862, above referred to, and the various acts of Congress amendatory thereof and supplemental thereto. That this is a suit commenced in this court, to wit, the Supreme Court of the State of Kansas,

being a court other than a circuit or district court of the United States, against your petitioners as members of such corporation and as Directors thereof, and is for an alleged liability of your petitioners as such members and as such Directors; and that your petitioners have a defense to this suit and the cause of action of the plaintiff herein, and as against the said plaintiff, arising under the constitution of the United States, and under a law of the United States, to wit, said acts of Congress hereinbefore referred to, and the various acts of Congress amendatory thereof and supplemental thereto, and of the rights, titles and obligations of your petitioners and each of them, under and by virtue thereof; and that the amount in dispute, exclusive of costs, exceeds, as to each of them, the sum or value of five hundred dollars. Your petitioners state that this suit has not been tried, but is now pending for trial in this honorable court.

Your petitioners now at the time of filing this their petition, and in this court, offer good and sufficient surety for their entering in the Circuit Court of the United States for the District of Kansas, on the first day of its now next session, copies of all process against them, and all pleadings, depositions, testimony and other proceedings in this cause, and also for their there appearing and entering special bail in the cause or suit, if special bail was originally requisite therein; and your petitioners make and file herewith a bond with good and sufficient surety for their entering in said Circuit Court on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for their there appearing and entering special bail in this suit, if special bail was originally requisite therein.

Wherefore, your petitioners pray this honorable court to accept this their petition and the said surety or bond, and to proceed no further in this suit.

FRED'K L. AMES.
SIDNEY DILLON.
G. M. DODGE.
RUSSELL SAGE.
THOS. T. ECKERT.
JAY GOULD.
JOHN HUMPHREYS.
W. L. SCOTT.
ELISHA ATKINS.
E. H. BAKER.

F. GORDON DEXTER,
DAVID DOWS.
AUGUSTUS SCHELL,
By SIDNEY DILLON,
His attorney in fact.
S. H. H. CLARK,
By SIDNEY DILLON,
His attorney in fact.
JOHN SHARP,
By SIDNEY DILLON,
His attorney in fact.

JOHN F. DILLON,
J. P. USHER,
A. L. WILLIAMS,
Attorneys for said Petitioners.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

F. L. Ames, Elisha Atkins, Ezra H. Baker, F. G. Dexter, W. L. Scott, G. M. Dodge, Sidney Dillon, David Dows, Jay Gould, Russell Sage, Solon Humphreys, T. T. Eckert, and Sidney Dillon as attorney in fact for S. H. H. Clark, Augustus Schell and John Sharp, being duly sworn, each sev-

erally says, that he is one of the above-named petitioners; that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

DAVID DOWS.
F. GORDON DEXTER.
AUGUSTUS SCHELL,
By SIDNEY DILLON,
His attorney in fact.
S. H. H. CLARK,
By SIDNEY DILLON,
His attorney in fact.
JOHN SHARP,
By SIDNEY DILLON,
His attorney in fact.
ELISHA ATKINS.
E. H. BAKER.
SIDNEY DILLON.
G. M. DODGE.
FRED'K L. AMES.
RUSSELL SAGE.
THOS. T. ECKERT.
JAY GOULD.
JOHN HUMPHREYS.
W. L. SCOTT.

Sworn to before me, this 4th day of October, A. D. 1883, by each of the aforesaid named affiants, except said Atkins, Baker, and Dexter, and by Sidney Dillon as the attorney in fact of the said Augustus Schell, the said S. H. H. Clark, and the said John Sharp.

Witness my hand and seal notarial hereunto set, this 4th day of October, 1883.

[Seal.]

W. W. COTTON,
Notary Public, Kings County, New York.
(Certificate filed in New York county.)

Sworn to before me by the said Elisha Atkins, F. G. Dexter, and Ezra H. Baker, this third day of October, 1883.

Witness my hand and seal notarial hereto set, this third day of October, 1883, at Boston, in the State of Massachusetts.

[Seal.]

JAMES G. HARRIS, *Notary Public.*

The State resisted the motion for removal into the Circuit Court, but no affirmative order was made by the court.

At the term of the Circuit Court of the United States next ensuing, a transcript of the record was filed in that court, and thereupon the State moved to remand, which motion was sustained by the Circuit Court, and the defendants come by writ of error to this court to reverse that order and judgment.

PROPOSITION I.

The allegation of the petition is, that the defendants have usurped and are exercising, using and enjoying certain franchises granted by the State to one of her own corporations, namely, the Kansas Pacific Railway Company; that such

usurpation is against the laws of the State of Kansas, and the defendants are required to show by what warrant or authority of law they have so usurped such franchises, and upon a hearing thereof that they be excluded from exercising and enjoying such franchises.

This claim made by the State is one under her own laws, and within her own jurisdiction and has no reference whatever to any franchises not granted by her own laws.

PROPOSITION II.

The right of the State of Kansas to exercise this sovereign prerogative is supreme, and cannot be questioned or abridged by reference to the laws of another sovereignty. Nor is it affected by the relationship of the parties, claimed to be usurpers, to another corporation organized by another sovereignty, whether such sovereignty be a State, the United States, or a foreign State or nation.

PROPOSITION III.

The right to exercise this prerogative of the State, and the subject of its exercise, both rest in and are governed by the laws of the State, and call for the interpretation and construction of no other laws, when, in the exercise of that trust, the State seeks to deal with only such franchises as she herself has granted.

PROPOSITION IV.

This proposition, with those foregoing, are applicable to the construction of the plaintiff's petition, and establish the fact that by the terms of that petition, and within its scope and purpose, no provision of Federal law is invoked, and so far as the action by the State is concerned, the suit does

not arise under the constitution or the laws of the United States.

PROPOSITION V.

The answer of the defendants asserts for their defense that they, together with the Government Directors, constitute the Directors of what they call the Union Pacific Railway Company, and thereupon they claim, with such Government Directors, the right to exercise these franchises granted by Kansas, and in violation of her laws, because the Union Pacific Railway Company is composed, among others, of the Kansas Pacific Railway Company, which, the defendants allege, was created and organized by the acts of Congress; and because further, it, the Kansas Pacific Company, is a constituent of the so-called Union Pacific Railway Company under the terms of certain articles of the consolidation, which articles are authorized by and were made in conformity with certain acts of Congress known as the Pacific Railroad Acts. The answer in other respects is essentially the same for all practical purposes as the answer of the Kansas Pacific Railway Company in the suit by the State against the latter. Both answers aver in nearly the same form of words that the Kansas Pacific Railway Company was organized under the acts of Congress aforesaid and was not created by or organized under the laws of the State of Kansas, nor had it ever been operated under those laws. Upon these allegations and these alone, defendants claim that issues have been framed by the State and defenses set up which warrant the removal of this cause into the Federal court and confer jurisdiction upon it.

PROPOSITION VI.

It appears, therefore, from this record, including the petitions for removal, that the defendants rely upon the following grounds for jurisdiction: First, that they are all citizens of

States other than Kansas. Second, that they are members of a Federal corporation, sued for an alleged liability as such, and have a defense arising under the constitution and laws of the United States. Third, that this is a suit of a civil nature at law or in equity, arising under the constitution and laws of the United States.

PROPOSITION VII.

It appears from this record that John Sharp, one of the defendants, is a citizen of Utah. He joined in the petition for the removal of this cause at the time that the answer and petition for removal were filed, which was about four months after the suit was commenced. Defendants allege that he had resigned, but do not say that he had resigned before the commencement of the suit. The court must, therefore, presume that at the commencement of the suit one of the defendants, as alleged by the record and as admitted by the defense, was a citizen of the Territory. It must also be presumed that that fact existed when removal was sought, because it is not affirmatively denied. But no removal could have been had even though John Sharp was not a citizen of the Territory, or had not been a party to the suit. The controversy must be between *citizens* of different States, or between citizens of a State and foreign States, citizens or subjects. Where the controversy is between a State of the Union and citizens of its own or other States of the Union, there can be no removal on the ground of citizenship. This is the plain meaning of the words of the removal act. See section 2 of the removal act of March 3, 1875.

PROPOSITION VIII.

The Union Pacific Rail*way* Company is not a Federal cororation in Kansas. The Union Pacific Rail*road* Company

may be a Federal corporation in the States and Territories through which it runs, but it has never had any existence in Kansas; and the laws of the United States contain no reference, direct or remote, of the existence of a company of the name of the Union Pacific Railway Company. Whether the articles of consolidation created a Federal corporation in Kansas, we shall consider in subsequent passages of this brief. The State has not, therefore, sued a corporation other than a banking corporation organized under a law of the United States; it has in effect not sued a corporation at all; it has sued certain individuals calling themselves, etc., which is merely *descriptio personarum*, if anything. The State has, therefore, not sued any member of a corporation organized under a law of the United States as such member. The suit is against these individuals as trespassers, regardless of their relationship with any company whatever. They are severally arraigned for a violation of the laws of Kansas made in reference to a company created by a State; they have not, therefore, been sued as members of a corporation for an alleged liability of such corporation. The State of Kansas has no claim against that shadowy entity without a habitation, and without a name taken from any legal authority, known as the Union Pacific Railway Company. Such a company may exist somewhere, and warrant or authority for its existence may even be found in the laws of the United States; but we are seeking to fix no liability upon such company as a corporation organized under a law of the United States. It is clear from the language of section 640, that the suit must be against a member of a Federal corporation as such member, either for an alleged liability of the corporation itself, or of such member as a member of the corporation. For the purposes of this suit it is a matter of total indifference to the State of Kansas under this section to what particular corpo-

ration these defendants may belong, because the purpose of the suit is solely to charge a violation against the defendants as usurpers of franchises granted by the State of Kansas.

PROPOSITION IX.

This suit, in no aspect of it, either as to the petition or the defense, can arise under the constitution or laws of the United States, or a treaty made, or which shall be made by the United States. Reference is hereby made to the argument in the brief appended to this in the case of The State against the Kansas Pacific Company, as to what is necessary to confer jurisdiction upon the court upon this claim as to the subject-matter of the action or defense as made.

PROPOSITION X.

Congress in enacting the Pacific Railroad acts had in view the carrying out of a great national policy, namely: the welding of the remotest sections of the Union by bonds of commercial interest, and the acquirement of transportation facilities to police the intermediate frontier. This court has stated the national policy in this regard, in the opinion delivered by Mr. Justice STRONG in *Platt v. Union Pacific Railway Company*, 99 U. S., page 59, as follows:

"We are seeking for the intention of Congress; and to discover that, we may look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object. Congress addressed itself to the work of securing a railroad from the Missouri river to the western boundary of the Territory of Nevada, and thence to the Pacific ocean. The work was vast, beyond the reach of private capital or enterprise. It could be accomplished only by the bestowal upon a corporation of very large governmental aid. The proposed road ran over mountains and through what was known to be an uninhabited desert for more than a thousand miles. The lands through which it must pass were supposed to be almost worthless, and quite unsalable, until they should be made, by the construction of a railroad, accessible to settlers and to eastern markets. The construction of a railroad through such a region was most

uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the act of 1862. This is apparent in almost every line of the act. For this reason the grants of land were made, the rights of way and of taking materials were given, and the subsidy bonds were loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864 additional aid was proffered, the grant of lands was doubled, and new privileges were conferred. We do not now attempt to portray the earnestness — the all-absorbing earnestness — with which Congress sought to secure the construction of the road by private enterprise."

Mr. Justice DAVIS, speaking for the court in the case of *United States v. Union Pacific Rld. Co.*, 91 U. S., page 79, says:

"The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the Government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion, besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were

possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace, even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and Indians."

PROPOSITION XI.

It therefore appears that it was the purpose of Congress to accomplish these ends by aiding private enterprise, and not by a direct exercise of power and authority on the part of the Government. But to accomplish this national purpose it was necessary directly to create a corporation which should build a road across that portion of territory to be traversed, which was at that time totally uninhabited, and was regarded as an irreclaimable waste, a desert. Hence in the first section it directly creates a corporation known as the Union Pacific Railroad Company and grants it franchises to be a railroad company, to own railroad property, and to enjoy and control it, to the accomplishment of the purpose for which it was created. Of the right of Congress to do this there can be, since the decision in *McCulloch v. The State of Maryland*, no question. At the time of the passage of these acts there were west of the Mississippi river several newly-created States, then sparsely settled, but even then rapidly growing in wealth and population, namely, the States of Iowa, Kansas, and Minnesota. These States had already created and organized railroad corporations, with a grant of all the necessary franchises to build, operate, and maintain public railways, which for the most part, under the terms of their charters, tended westward from the Mississippi, in the general direction of the great line to be built by the Government toward the Pacific ocean. At the request of these States, which had with all other States a vast interest in the promotion of this national purpose, and with a view to aid in the accomplishment of that purpose, Congress

tendered these already existing and organized corporations such inducements as would secure their coöperation in the accomplishment of this purpose. They were already created, and generally with authority to do the very thing which Congress desired should be done. It was not necessary to recreate them for that purpose. It was of importance that the roads to be built should be built as speedily as possible. The resources of the people of these new States were limited, there was very little private wealth, and if the means were to be acquired by these corporations to build their roads at once whose general trend, as we have said, was in the direction of the Union Pacific, they must have been aided by the bounty of Congress. Two ends were to be achieved by the Federal Government affording this bounty — namely, coöperation tending towards the rapid construction of this national highway; and second, the rendition of services to the nation in the speedy carriage of mails, troops, munitions of war, etc. While therefore it was the purpose of Congress to leave the construction of these roads to private wealth and private enterprise, it could none the less make an advantageous contract with these companies, which would at once accomplish the Federal purpose by securing the completion of the roads at an early date. To perform the needed services would impose no onerous or difficult burden upon the companies which should undertake them. The right given to the several State corporations above referred to, to become part of the Pacific system, was a purely voluntary one, so far as the companies themselves were concerned. If, for instance, the Leavenworth, Pawnee & Western Railroad Company (now the Kansas Pacific) should have concluded that it might more advantageously build and operate its own road without the aid of the Congressional bounty, it could have done so. If, however, it chose

to accept the Congressional bounty, it bound itself to perform the services for the General Government, and to keep its promises to the General Government as to the repayment of money advanced upon subsidy bonds to the same degree that it would have been bound if it had mortgaged its road and its franchises to an individual for the moneys with which to construct its property. The terms upon which this bounty was offered and the facilities granted by the General Government were various, but in no respect were they inconsistent with the duties and obligations which the company owed the State. Or, to put it in another form, the State was just as much interested in seeing that this company carried mails, troops, and munitions of war, that it met its obligations to its creditors, that it repaid the debts it owed the United States, as were the United States. The Government of the United States is itself a trust, in which the State of Kansas has as full a share and interest as any of the States of the Union. And there could be no obstruction to, or deterioration of the purpose and objects of the Government bounty towards this road which would not touch the State of Kansas, and affect her vital interests as much or more than that of any State in the Union. It is clear then that Congress, by a contract with the Leavenworth, Pawnee & Western Railroad Company, made it, with the cheerful assent of the State, an instrument to promote this great national policy. It neither sought to destroy its existence as a State corporation, which would have been impossible, nor to reinvest it with any powers or privileges inconsistent with its charter. So long as the Kansas Pacific Railway Company, therefore, should continue to perform its duties or obligations to the Government under its agreement with the United States, by the existence of the provisions of the acts of Congress, and paid its debts to the United States

when they were due, the United States had no interest in it. In all other respects it was subject to the State which created it, and to her laws. This is so apparent that this is the relation which the Kansas Pacific Company occupies toward the United States upon the face of this act, that there is nothing for construction or interpretation upon the same. It is true that they make a claim of corporate creation and existence under this law for the Kansas Pacific road, but no grant of corporate existence could lie so latent in an act as to call for construction. The limitation upon the power of the corporation created might call for construction, but if Congress had intended to create a corporation, it would have put its intention beyond doubt, and would not have done it by implication. Certainly no just claim can be fairly made from the act of Congress when the act of Congress itself, in plain terms as this does, disclaims and repels the possibility of such creation.

PROPOSITION XII.

Whether the Kansas Pacific Railway Company is a Federal corporation or not makes no difference in this suit, for we seek to exclude the defendants from no franchises which the Kansas Pacific Company has derived from the United States, but we do desire to preclude their exercise of those which the State has granted the Kansas Pacific Company. From this discussion, therefore, made for that purpose, and that purpose alone, of the intent and meaning of the Pacific Railroad acts, it is apparent that no defense can arise under these acts to the assertion of a right of the State in this action.

PROPOSITION XIII.

Since the general purpose of the Pacific Railroad acts affords not even a suggestion of a question which might be

raised in this controversy of a Federal nature, an attempt has been made, in the answer of the defendants, by a suggestion of a consolidation of this company and the creation of the Union Pacific Rail*way* company, under and by virtue of the sixteenth sections respectively of the acts of 1862 and 1864, to import into this case an essential Federal ingredient. The consolidation sections, like the rest of the act, not only afford no Federal question to the defendants, but in express and positive terms preclude their raising such an issue. This we shall state and argue in the two succeeding propositions.

PROPOSITION XIV.

By reference to the whole law, and to its history as stated by Judge DAVIS in the opinion cited in proposition 11, it will sufficiently appear that Congress had two purposes to subserve—first, to induce the investment of private capital in the construction of the road; and second, to push its construction to completion as fast as possible. Congress thought, in the language of Shakespeare,

"If 't were done when 't is done, 't were well 't were done quickly."

The object, therefore, in view in the provisions of the act of 1862, as well as in the act of 1864, was to secure the speedy construction of the road. So far as the state corporations were concerned, they needed no authority from Congress to consolidate. Their authority to consolidate could be readily obtained from the States where no provisions had already been made. Not so the Union Pacific Railroad Company, which was a member of this system. It could have no right to consolidate with the other branches of the system, except by the permission of Congress. It could derive no authority to consolidate from the State in which it was located, because its powers in this respect were within the jurisdiction solely of Congress. The sixteenth section of

these two acts, therefore, amount only to a permission to the Union Pacific Railroad to consolidate with corporations created by the States and forming part of the system, and this permission was clearly given for but one purpose only. It was not to accomplish the creation of a new company, into which should blend and merge irreclaimably the identities and powers of all the constituent companies, but it was to enable the formation of a working compact between these companies, to secure their coöperation for the accomplishment of the then all-essential purpose, namely—the *rapid* construction of the Pacific Railroad system and the Union Pacific Railroad. That Congress had this purpose solely in view, and had not what is claimed, the purpose of wresting corporations from the State which created them, and, by consolidation, placing them exclusively under Federal control, is clearly manifest, and may be gathered from the language of section 10 of the act of 1862. For the convenience of the court we here reprint section 10, italicizing those portions which sustain this view of Congressional intent:.

"SEC. 10. *And be it further enacted,* That the said company, *chartered by the State of Kansas,* shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads, respectively, *said companies, or either of them, may unite upon equal terms with the first-named company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines in this act hereinafter mentioned, through the Territories from the State of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company.* And *the Hannibal & Saint Joseph Railroad, the Pacific Railroad Company of Missouri, and the first-named company, or either of them,* on filing their assent to this act, as aforesaid, may unite upon equal terms, under this act, with the said Kansas company, *in constructing said railroad and telegraph,* to said meridian of longitude, *with the consent of the said State of Kansas;* and in case said first-

named company shall complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, *said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said State,* upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

Section 16 of the act of 1862, in very brief terms, permits all the companies mentioned in the act, both those created by the State and the one created by the United States, to form themselves into a consolidated company, which companies shall thereafter "proceed to construct said "road and branches, and telegraph line as provided in this "act." As we said before, the purpose of this provision was to secure the coöperation of all the constituent companies to the speedy accomplishment of the national object, and not without the consent of the States to create a Federal monster of a corporation, ramifying throughout all the new Western States, and amenable to the laws of none. The necessity of the consent of the States, even to this qualified form of consolidation, must be implied from this provision, even though not plainly stated. In the act of 1864 the purpose of Congress in permitting the Union Pacific Company to consolidate with the State corporations was put beyond doubt, and likewise the source of the authority for so consolidating was plainly stated. The language in the first section is permissive merely. In the act of 1862 Congress had in contemplation the consolidation of all the companies named in the act into one company, and their coöperation to push forward the construction of the road to the Pacific, as well as to build

their several branches. In the act of 1864 it permitted the Union Pacific Company, upon terms that might be agreed upon, to consolidate with any one or more of the companies authorized to participate in the benefits of the act; that is to say, the Union Pacific Company derived its authority to consolidate from this act. Any one or more of the State corporations could consolidate with the Union Pacific Company by the terms of the act, not only upon such terms and conditions, and in such manner as shall be not only incompatible with the acts of Congress, but the laws of the State or States in which the road or roads of such companies may be. Or, to put it in another way, as plainly meant by the act, the Union Pacific Company, if it should desire it, might consolidate with one or all of the State companies, and this act should be its plenary authority; but the State companies which might desire to consolidate with the Union Pacific were referred to the laws of the State or States in which the road of such companies may be. That is to say, the right of the Union Pacific to consolidate would be clear and unquestioned under this act, but the right of the Kansas Pacific Company to consolidate would depend wholly upon whether the policy or laws of the State of Kansas permitted it to consolidate. For the convenience of the court, we here insert section sixteen of this act, with such portions of the language of the section italicized as aid in construing the Congressional intent:

"SEC. 16. *And be it further enacted*, That any *two or more* of the companies authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their *organizations*, as the same *may or shall be*, upon such terms and conditions, and in such manner as *they may agree upon*, and as shall *not be incompatible with this act, or the laws of the State or States in which the road of such companies may be*, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated,

shall succeed to, possess, and be entitled to receive *from the Government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively.* And all other provisions of this act, *so far as applicable*, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall *apply and be of force* as to such consolidated organization. And in case upon the *completion* by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may *do and perform*, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts, and things to be done and performed by the Government of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value to be estimated by competent engineers of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for, and used in, the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits, and privileges

hereinbefore granted to such other company. *And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization.* And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other. *Provided, however,* That rights and interests at any time acquired by one such consolidated organization, shall not be impaired by another thereof. It is further provided that, should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific Road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific Road, and upon doing so, shall enjoy all the rights, privileges, and benefits conferred by this act on said Union Pacific Railroad Company."

From this act, therefore, it appears that when the right of the Kansas Pacific Company to consolidate is questioned by the State of Kansas, there need be, and indeed there can be, no question of law arise which is not primarily and ultimately referable to the statutes and laws of the State of Kansas. So far as this particular suit is concerned, the charge is the violation of the laws of Kansas. If the consolidation is brought in question in this case, as it undoubtedly is, its invalidity is asserted, not upon a failure to comply with the act of Congress, but upon a failure to comply with the laws of Kansas. The laws of Congress are not questioned; the right to consolidate is not questioned; the existence of the consolidated company is not questioned; but the right of these gentlemen is questioned to use these franchises, because it is a right exercised in violation of the laws of Kansas. So far as the other elements of the company are concerned the consolidation may be valid, and the right

unquestioned. But Congress has said in this act that no such consolidated company shall use franchises in Kansas unless they shall do it upon the terms, conditions, and in such manner as may be compatible with the laws of the State of Kansas. So far, then, from these acts affording a defense to these defendants for a violation of the laws of Kansas in this regard, it in terms declares them to be subject and amenable to those laws.

PROPOSITION XV.

It was not the purpose of Congress in section 16 of the act of 1864, any more than in section 16 of the act of 1862, in permitting the Union Pacific Railroad Company to consolidate with companies of State creation, to produce a new company, and to obliterate, so far as its domestic duties and relations were concerned, each of the State corporations entering into the compact. The object of Congress in this section is not only patent, but plainly expressed. It was limited to one purpose, as we have before repeatedly stated: to secure a pooling of the issues and interests of the constituent companies, to the end that the road might be speedily constructed. It agrees upon its behalf that the consolidated company shall have from the United States the same gifts, grants, benefits and advantages that they would have had if remaining separate, and that they should respectively perform the terms and conditions of such grants and benefits; and that the united company should be amenable to the same duties and obligations and no more than should have been exacted from the constituent companies under the acts. In other words, consolidation would, so far as the domestic duties and obligations of the constituent State companies are concerned, under their respective charters and the laws of their respective States, be totally un-

affected by the union of their corporate interests in the construction of the road. In other words, the same relative condition would have existed between the constituent companies as exists between the States of the Union and the United States. Within the powers and domain created by the constitution for the operation of Federal authority, it would have been supreme. In all other respects the States within their respective jurisdictions are equally sovereign and supreme. These companies would have been at all times, not only by the policy and laws of the States, but by the policy and laws of the United States, compelled to render unto Cæsar the things which were Cæsar's. As we have before said, in securing the continued performance of its duties and obligations to the United States by this company, the State of Kansas has no less vital an interest than the United States themselves; but as between the company and the State a relationship exists, which it is equally the duty and the interest of the Federal Government to protect and uphold. We contend, therefore, that the consolidation leaves the several constituent companies, in respect to their relations to the State, their existence under their charter, and their subordination to her laws, exactly as it found them.

PROPOSITION XVI.

But we may consider, for the purposes of this argument, that the consolidation created a new and independent company, owing its existence to the permission of the acts of Congress in the section above quoted, and the several States. But even then we contend that the constituent companies of this consolidation preserve their domestic relations and character in the several sovereignties creating them, and that the Kansas Pacific Railway Company remained, notwithstanding the consolidation, a Kansas corporation within the limits of

Kansas. The doctrine, as stated by Mr. Pierce in his treatise on "The Law of Railroads," page 22, is as follows: "A consolidated railroad corporation formed by the union of "two corporations, each created by a different State, is, so far "as property and business within each State are concerned, "subject, unless otherwise provided in the act of consolida- "tion, to the same control therein as before, and in each "State is to be treated as a domestic corporation. It is as "to property within each State subject in the appointment of "receivers and otherwise to the jurisdiction of its courts."

In the case of the *O. & M. Rld. Co. v. Wheeler*, 1 Black, 297, the court uses the following language:

"The averments in the declaration would seem to imply that the plaintiffs claim to have created a corporate body, and to have been endued with the capacities and faculties it possesses by the coöperating legislation of the two States, and to be one and the same legal being in both States.

"If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of the *Bank of Augusta v. Earle*, before referred to.

"It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State; and neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons; but the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers."

See also to the same purpose *Central Railroad Co. v. Georgia*, 92 U. S. 665; *Peik v. Chicago & N. W. Rly. Co.*, 94 U. S. 164; *Muller v. Dows*, 94 U. S. 444. In the last-mentioned case, the court, on page 447, uses the following language, which is both emphatic and pertinent to this case:

"Still, it is argued on behalf of the appellants that the Chicago & Southwestern Railway Company cannot claim to be a corporation created by the

laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence it is argued the corporation was created by the laws of Iowa and Missouri; and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the Circut Court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa respecting railroad consolidation of roads within the State with others outside of the State were, that any railroad company, organized under the laws of the State, or that might thus be organized, should have power to intersect, join and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the State line, or at any other point as might be mutually agreed upon by said companies; and such railroads were authorized to 'merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa."

See also *Railroad Co. v. Whitton*, 13 Wall. 283; *Railroad Co. v. Georgia*, 98 U. S. 359; *Tomlinson v. Branch*, 15 Wall. 460; *Johnson v. P. W. & B. Rld. Co.*, 9 Fed. Rep. 6.

In the case of *R. & M. Rld. Co. v. Farmers' Loan and Trust Co.*, 49 Ill. 331, the court says:

"Our view of the effect of the consolidation contract between the Rockton Company and the Wisconsin Company, which we hold to have been legally made, is briefly this: while it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way, and to the same degree, that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither State could take jurisdiction over the property or proceedings of the corporation beyond its own limits, and, as said by the court in the *Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, 297, a corporation 'can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and powers.' In the same case the court say: that a corporation cannot be created by the coöperating legislation of two States, so as to be the same legal entity in both States, and where two States have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must, nevertheless, be considered as a distinct corporation in each State.

"The counsel for plaintiff in error urges upon us the authority of this

case, but draws from it the mistaken inference, as we regard it, that even if the contract of consolidation between the Rockton Company and the Wisconsin Company was legally made, nevertheless, 'each retained its former existence, identity, rights, franchises, powers and privileges.' If such had been the fact, the consolidation would have been, practically, a nullity. But the contract of consolidation, and the subsequent legislation, created substantially a new corporation with a new name, but such corporation, in a legal point of view, was, and has remained a distinct corporation in each State, though the two have a common name, common stock and a common board of directors. There is a Wisconsin corporation under the name of The Racine & Mississippi Railroad Company, and there is an Illinois corporation of the same name, and the original corporations in each State have been transmuted into these."

See also *Hart v. B. H. & E. Rld. Co.*, 40 Conn. 539.

In the case of *Railroad Co. v. Harris*, 12 Wall. 65, the controversy was as follows: The B. & O. Railroad Company was chartered by the State of Maryland, February 28, 1827, to construct a railroad from Baltimore to the Ohio river. Eight days later, the State of Virginia passed an act reciting the passage of the Maryland charter, and granting the B. & O. road the same rights and privileges in Virginia as were granted in Maryland. On the 21st of February, 1831, the State of Maryland granted the same privilege of building a branch to Washington, D. C., and on the 2d of March, 1831, Congress authorized the construction of such branch, and gave the company the same rights as were given by Maryland. The court says: "In both (the Virginia and Federal acts) "the original Maryland act of incorporation is referred to, "but neither expressly nor by implication created a new cor- "poration." For the purpose of conferring corporate franchises by Congress, the act of Congress, recited in the Harris case, was much stronger and more efficient than the acts of Congress known as the Pacific Railroad Acts.

See also *Farnum v. Blackstone Canal*, 1 Sumner (Mass.), 47; *Rld. Co. v. Vance*, 96 U. S. 450; Angell and Ames on Corporations (11th ed.), 164; *Bissell v. Michigan Rld. Co.*,

22 N. Y. 258; *Attorney General v. Boston & Maine Rld. Co.*, 109 Mass. 99; *Delaware Railroad Tax*, 18 Wall. 206.

If, then, as we claim, the consolidation necessarily leaves the Kansas Pacific Company still in existence within the jurisdiction of Kansas as a State corporation, there can be no question arise in this suit which will involve or necessitate the construction of any Federal law, even though the consolidation was permitted by the act of Congress without regard to and in contravention of the laws of Kansas, and even though such consolidation was valid in all other respects.

PROPOSITION XVII.

But it is claimed that the appearance of the Government Directors in this suit, and their being made parties thereto upon their own application, necessarily imports a question into the case which will involve the construction of the rights of the United States. We had singled out certain gentlemen who claim to be Directors of the Union Pacific Railway Company, so called, and charged them with usurping certain franchises belonging to the State of Kansas, and asked that they be excluded from the use of the same. By voluntarily seeking to become parties to this suit, the Government Directors of the Union Pacific Railroad Company can have no status in court except as persons desiring to be charged with the usurpation of franchises granted by the State of Kansas within her jurisdiction and against her laws, and to be excluded therefrom, along with the other gentlemen whom the State saw fit to sue. If there was any interest of the United States that the State was infringing, and which the parties sued were either failing or refusing to adequately protect, then the Government Directors might sustain some sort of a logical attitude towards this case.

There is nowhere, either in the laws of the State or of the United States, any provision for the appointment of directors by the United States of any consolidated company known as the Union Pacific Rail*way* Company, nor of any consolidated company at all, nor of any company organized by the laws of any State. The act of 1862, in the provisions thereof which create and provide for the organization of the Union Pacific Rail*road* Company, directs that in addition to the directors to be chosen by itself, two additional directors "Shall be appointed by the President of the United States, "who shall act with the body of directors and to be denomi-"nated Directors on the part of the Government; any "vacancy happening in the Government Directors at any "time, may be filled by the President of the United States. "The Directors to be appointed by the President shall not be "stockholders of the Union Pacific Company." This provision was amended by the 13th section of the act of 1864, which is as follows:

"SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said Government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The Government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management and progress of the work, and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and, while absent from home, attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide."

By this provision construed *in pari materia*, the General Government has created functionaries through whom to

exercise its visitorial power over the Union Pacific Railroad Company, a corporation of its own creation, and has prescribed certain qualifications for them—among others, that they shall not be stockholders in the Union Pacific Railroad Company. There is nothing to forbid their being stockholders in the Kansas Pacific Railway Company, or any other of the various companies of the States authorized by the acts of Congress to construct branches of the Pacific system, and they are not authorized or permitted to in anywise interfere with or supervise or inquire into the direction or control of any other company than the Union Pacific Railroad Company. The Directors chosen by the Union Pacific Railroad of its own members are required to be stockholders of that company. The prohibition against the holding of stock by the Government Directors shows conclusively that the object which the Government had in creating and appointing such functionaries was to exercise its visitorial power, and in nowise to become a partner in the management or control of the business of the company or its operations. The purpose of these functionaries has nothing to do with the exercise of the rights and franchises of the company. They are appointed solely to look and hear, and to see that the Union Pacific Railroad Company keeps its contracts and engagements with the United States under the Pacific Railroad acts. This court, in discussing the contract relations existing between the Union Pacific Railroad Company and the United States, outside of its charter obligations and duties, in the case of *Railroad Co. v. Peniston*, 18 Wall. 32, uses the following language: "The Government owns "none of its stock, and though it may appoint two of the "Directors, the right thus to appoint is plainly reserved for "the sole purpose of enabling the enforcement of the en-

"gagements which the company assumed—the engagements "to which we have already alluded."

The failure of this act to appoint Government Directors of the State companies which under the acts entered into engagements with and were the recipients of the bounty of the Federal Government, is most significant. First, as conclusively showing that Congress perceived that it had no right to assume or exercise visitorial powers over these latter companies; and second, as showing that the Federal Government presumed that the States, through an enlightened selfishness, if from no higher motive, would, while exercising a control over these companies under their own laws, keep them strictly to their engagements with the United States.

PROPOSITION XVIII.

It appears from the answer that it was apprehended by these functionaries that by virtue of the consolidation and the unauthorized change of name, they would be excluded from the performance of their official duties under the law. The ministerial officers of the United States who were called upon for a summary determination of this question, very rightly decided that the consolidation could not preclude them from the exercise of the powers conferred upon them by law. It is too clear for argument, that if the consolidation could not limit the powers with which the law and their appointment endowed them, it cannot enlarge those powers beyond the intention of the act of Congress creating them. Their exercise of visitorial authority on behalf of the United States is therefore now, even though the consolidation be valid, strictly limited to the property of the company, and of the only company of which by the law and their appointment they are made Directors. They are to watch and guard the

interests of the United States, and see that the engagements with the United States are kept upon the line of railroad from Omaha to Ogden, known as the Union Pacific Railroad; but there their duties cease. They certainly have no right to intrude into the State of Kansas, and to justify the usurpation of franchises granted by her against her laws, upon a claim of necessary participation in such usurpation.

PROPOSITION XIX.

We will dispose of that part of the defendant's answer touching the Denver Pacific Railway and Telegraph Company, in a word. If the foregoing views taken by the State are sound in law, as we most confidently believe them to be, all the part relating to the Denver Pacific Railway Company is totally irrelevant and surplusage, and has nothing whatever to do with this case, nor the one against the Kansas Pacific Railway Company.

PROPOSITION XX.

It is asserted broadly that the exercise of the powers of a State within her own jurisdiction, against a corporation of her own creation for a violation of her own laws, tends to an inevitable injury of the United States, by preventing the defendant from performing its duties to the United States. Such a claim of defense as this could be with as much propriety asserted in every suit brought against this company to enforce its liability. It appears in this record that the company has given a large number of mortgages. Upon an attempted foreclosure of any of these mortgages it could with as much propriety be asserted that upon an establishment of a default, all the property and franchises of the company would be wrested from them, and knocked down to the highest bidder at public auction, and it (the

company) would thereby be precluded from performing the duties and obligations it owed under the acts of Congress. The absurdity of this position is demonstrated by the mere statement of it. The property of this company had been for two years in the hands of a receiver, a large part of the time in the hands of the receiver appointed by a court of the State of Kansas. During this period the company was excluded from the operation of the road or the performance of any of the duties above described. But the officer of the court, although the order appointing him was silent upon that subject, plainly took the road *cum onere*, and was compelled to operate it in compliance with the laws of the State, and perform the company's duties and obligations to the United States. So in this instance, if the road was taken away from this company, and this company deprived of its franchises, it would not be deserted or abandoned; the interest of the State of Kansas would plainly preclude that possibility, and whoever the State of Kansas might endow as a corporation and reinvest them with these franchises, would take the grant from the State subject to all the burdens and duties that rested upon the present company. And here it is proper to say that it must be apparent from the attitude taken by the State in these cases that there is no desire to destroy this corporation or its property. The State here and now states frankly that the object of these suits is to compel obedience to the laws of Kansas; and if, at any time, even after judgment, the corporation will resume its franchises and return to a performance of its duties and obligations to the State, this proceeding will be dismissed.

PROPOSITION XXI.

It must be apparent to the court that the attitude of this corporation in attempting to withdraw itself from the con-

trol of the State, which it does by interposing these defenses, involves the most far-reaching and disastrous consequences if permitted. If they succeed in establishing, at the threshold of this case, by the judgment of this court—as they needs must if they succeed in conferring jurisdiction upon the Circuit Court of the United States—that the Kansas Pacific Railway Company is, by virtue of acts of Congress, a Federal corporation, and is thereby relieved from all duties and obligations under the laws of the State of Kansas, and the control of the State of Kansas over it is terminated except in a few matters of petty police, then it will follow that many corporations in nearly all the Western States of the Union, which have by similar acts of Congress been endowed with certain privileges and bounties from the Federal Government, and which have entered into similar engagements and duties with the United States in consideration of such grants, will cease to be State corporations, and will become Federal corporations, subject only to Federal control and jurisdiction. It is not necessary to the assertion of Federal sovereignty, nor to the protection of the rights and guaranties under Federal law, that such a judgment should be made. And from the careful observance and consistent preservation of the rights of the several States under our form of Government by this court in all its decisions, we are confident that jurisdiction will not be entertained in this case in behalf of the Circuit Court of the United States except upon the most plain and undoubted grounds for its entertainment.

Our position in this regard is stated by one of the justices of this court with an eloquence, force and precision that we cannot hope to equal, and therefore we quote it:

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its Territorial limits as any foreign na-

tion, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all these powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained; and that consequently in relation to these, the authority of a State is complete, unqualified, and exclusive." (*City of New York v. Miln, 11 Peters, 138.*)

PROPOSITION XXII.

Upon the foregoing points and principles stated in this and the case against the Kansas Pacific Railway Company, we submit that the order remanding this case to the Supreme Court of the State should be affirmed.

W. A. JOHNSTON,
Attorney General.

C. A. SEWARD,
W. H. ROSSINGTON,
GEO. S. GREEN,
A. A. HARRIS,
Of Counsel.

Circuit Court of the United States

DISTRICT OF KANSAS.

The State of Kansas

vs.

The Kansas Pacific Railway Company.

BRIEF,

ON MOTION TO REMAND,

UPON THE

FACTS AND PRINCIPLES OF GENERAL LAW.

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Circuit Court of the United States,

DISTRICT OF KANSAS.

THE STATE OF KANSAS

vs.

THE KANSAS PACIFIC RAILWAY COMPANY.

BRIEF, ON MOTION TO REMAND, UPON THE FACTS AND PRINCIPLES GENERAL OF LAW.

THE CASE.

The Territory and State of Kansas created a railway corporation with all the powers incident thereto. Certain Acts of Congress gave to such corporation a right of way through the public lands—alternate sections on the line—and pecuniary aid by means of bonds. By a willful perversion of the Acts by which this bounty was bestowed, the corporation claimed, and for an offensive purpose, to have been consolidated with another Railway of Federal incorporation in another State, and thereby to have been withdrawn from the State of Kansas, and to have been absolved from its allegiance to the State, and released from the obligation to obey its laws. The State, disre-

garding the consolidation, commenced a suit in one of its own courts against the original corporation to enforce obedience to the State Statutes and the corporation removed the cause into the United States Circuit Court.

The State now moves to remand the case to the State Court upon two briefs—one upon the Federal Constitution and Statutes, and the other—this one—upon the facts and the principles of general law.

History of Kansas.

The State of Kansas was originally embraced within the territory which was ceded by France to the United States on the 30th of April, 1803.

The treaty of cession was known as the Louisiana Treaty. It was commended to Congress on the 13th of October, 1803, by President Jefferson, who stated in his message as follows:

"Whilst the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States, and an uncontrolled communication through their whole source, free from collision with other Powers, and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our treasury, an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws."

The treaty in its third article provided as follows:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States. In the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

On the 31st day of October, 1803, Congress passed an Act (2 *Stats.*, 245) authorizing the President to take possession of, and occupy the territory ceded by France to the United States.

Under this authorization formal possession was taken of

the ceded territory on the 20th of December, 1803, by Messrs. Claiborne and Wilkinson.

On the 26th of March, 1804, Congress passed an Act (2 *Stats.*, 283) dividing the ceded territory by an east and west line, commencing on the Mississippi River at the 33° of North Latitude, and extending to the western boundary of the cession, and styled the northern portion so divided "The District of Louisiana," and the southern portion, "The Territory of Orleans."

On the 3d of March, 1805, Congress passed an Act (2 *Stats.*, 331) changing the name of the northern portion, so set apart from "The District of Louisiana," to "The Territory of Louisiana."

On the 4th of June, 1812, Congress passed an Act (2 *Stats.*, 743) changing the name of the Territory from "Louisiana" to "Missouri," and providing for the organization of a temporary government, and gave to the general assembly—

"Power to make laws in all cases, both civil and criminal, for the good government of the people of the said Territory, not repugnant to, or inconsistent with the Constitution and laws of the United States."

The territorial government of Missouri, on the 19th of January 1816, adopted by statute the common law of England as a portion of the laws which the general assembly were authorized to make.

On the 30th of May, 1854, Congress passed an Act (10 *Stats.*, 283) creating the Territory of Kansas, authorizing a territorial government, and providing particularly as follows:

"The legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act."

An election for a council and a House of Representatives was held pursuant to the provisions of this Act on the 30th of March, 1855, and the legislative assembly met on

the 22d of July, 1855, and passed the body of laws known as the Statutes of Kansas Territory of 1855. Chapter 96 of this body of laws adopts the common law of England as a portion of the laws which, under the Act of Congress, the Legislature of the Territory might lawfully pass.

The Territory of Kansas adopted a State constitution on the 29th of July, 1859, which was ratified by the people on the 4th of October, 1859.

On the 29th of January, 1861, Congress passed an Act (12 *Stats.*, 126) reciting:

"Whereas the people of the Territory of Kansas * * did form for themselves a constitution and State government * * which was ratified and adopted by the people * * on the fourth day of October, one thousand eight hundred and fifty-nine, and * * has asked the Congress of the United States to admit the said territory into the Union as a State, on an equal footing with the other States. Be it enacted, &c., that the State of Kansas shall be and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever."

On the 31st of October, 1868, the State of Kansas passed an Act, now known as Chapter 119 of the Compiled Laws of 1879, which provided, among other things, as follows:

"The common law, as modified by constitutional and territorial law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of this state."

There was a legal necessity for this adoption of the common law by the legislatures of Kansas and Missouri. Had they not done so, it would have been claimed, as it was similarly claimed in *Pollard* v. *Hagan*, (3 *How.*, 220), in reference to the treaty with Spain, that the civil law which had existed and been in force in the Territory of Louisiana when it appertained to the French Republic, continued to be the law of such territory after its cession to the United States.

THE FEE OF THE PUBLIC LANDS IS IN THE UNITED STATES, AND CAN BE ALIENATED BY CONGRESS ONLY.

In *Bagnell* v. *Broderick* (13 *Peters*, 450), the Court said:

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance, the fee is in the Government, which by the patent passes to the grantee."

From the earliest period in the history of our Government the people have declared their unwillingness to have any interference except by Congress with the original conveyance and distribution of the public lands. This feeling found emphatic utterance in the ordinance of 1787 (1 *Stats.*, 51) for the government of the territory of the United States northwest of the River Ohio, which, after providing for the creation of territorial governments, and for the admission of States subsequently to be formed on an equal footing with the original States in all respects whatever, provided as follows:

"The legislatures of those districts or new States shall never interfere with the primary disposal of the soil of the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."

This provision was repeated in the Act of Congress of May 30th, 1854, authorizing a territorial government for the Territory of Kansas, in these words:

"But no law shall be passed interfering with the primary disposal of the soil."

So also in the Act of Congress of January 29th, 1861, for the admission of Kansas into the Union, the same inhibition was repeated in these words:

"*Fifth.*—That * * * * * the foregoing propositions hereinbefore offered are on the condition that the people of Kansas shall provide by an ordinance,

irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof."

The State did so provide by an ordinance approved January 20, 1862 (*Comp. Laws, Chap.* 1), which contained, among other things, the following:

"And it is hereby ordained, that this State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title to said soil to *bona-fide* purchasers thereof."

After Congress has alienated the fee, and it has become part of the property of the grantee within the domain of the State, then, as was said in *Wilcox* v. *Jackson* (13 *Peters*, 516),

"The State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her Courts, and to regulate the disposal of the property of her citizens by descent, devise or alienation."

The Union Pacific has by its charter "perpetual succession." The Kansas Pacific holds its right of way and lands "upon the same terms and conditions" as the Union Pacific. The Congressional grants to these two companies were to be held, therefore, in perpetuity, and that which is so held is alienated by the United States and held in fee. (*Black* v. *Delaware*, 24 *N. J. Eq.*, 465; *Boston* v. *New York*, 13 *R. I.*, 277.)

THE NATION HAS ALWAYS FAVORED THE CONSTRUCTION OF INTERNAL IMPROVEMENTS BY MEANS OF THE PUBLIC LANDS, OR OF THE PROCEEDS THEREOF.

The form in which the public lands, or their proceeds, should be appropriated for internal improvements for the benefit of the nation at large has, of course, varied with the march of improvement. Thus in the Act of Congress of

April 30, 1802 (2 *Stats.*, 175), providing for the admission of the State of Ohio, it was provided as follows:

"That one-twentieth part of the net proceeds of the lands lying within the said State sold by Congress, from and after the 30th day of June next, after deducting all expenses incident to the same, shall be applied to the laying out and making of public roads leading from the navigable waters emptying into the Atlantic to the Ohio, to the said State, and through the same, such roads to be laid out under authority of Congress, with the consent of the several States, through which the road shall pass."

The Act of Congress of April 19, 1816 (3 *Stats.*, 290) authorizing the admission of the State of Indiana, provided as follows:

"That five per centum of the net proceeds of the lands lying within said territory, and which shall be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the said State, under the direction of the Legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress."

The Act of Congress of April 18, 1818 (3 *Stats.*, 430), for the admission of the State of Illinois, provided as follows:

"That five per cent. of the net proceeds of the lands lying within said State and which shall be sold by Congress from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, namely: Two-fifths to be disbursed under the direction of Congress in making roads leading to the State, the residue to be appropriated by the Legislature of the State for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university."

The Act of Congress of March 6, 1820, (3 *Stats.*, 545) providing for the admission of the State of Missouri, provided as follows:

"That five per cent. of the net proceeds of the sale of lands lying within the said territory or State, and which shall be sold by Congress from and after the first day of January next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the State, under the direction of the Legislature thereof, and the other two-fifths in defraying, under the direction of Congress, the expenses to be incurred in the making of a road or roads, canal or canals, leading to the said State."

The Act of Congress of January 29, 1861, (12 *Stats.*, 127), for the admission into the Union of the State of Kansas, provided as follows:

"That five per centum of the net proceeds of the sales of all public lands, lying within said State, which shall be sold by Congress after the admission of said State into the Union, and after deducting all the expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, or for other purposes as the Legislature shall direct."

Congress, in carrying out this intention of the people, has, from a very early period and until the present time, granted lands, or the proceeds of lands, to the several States for making public roads, canals, bridges and railways. It has also granted rights of way over the public lands directly to railways incorporated by the Territories or States. It has also granted lands and financial aid to railways incorporated by Congress, and it has granted lands with an inhibition against any application to Congress for financial aid. It has also authorized its own creations to accept grants of lands from a State, and has thus made the construction of public highways an interchangeable duty between the Federal Government and the several States.

A *resumé* of the Acts of Congress in this regard will not be without its value.

The Act of Congress of March 29th, 1806 (2 *Stats.*, 357), for regulating the laying out and making of a road from Cumberland in the State of Maryland, to the State of Ohio, provided for such road, "four rods in width," and for obtaining the—

"Consent for making the road of the State or States through which the same has been laid out."

From that date until May 25th, 1838, Congress continually passed Acts in relation to the Cumberland road, and made appropriations therefor.

The Acts of the States consenting to the road provided

for the erection of toll-gates, the appointment of toll-gatherers, and the rates of toll, and for the surrender of the road to the States respectively, on reimbursement by them, through the designated sources, of the amount expended.

This form of donation—that is, of a right of way—from the Federal Government runs through all the statutes.

After the introduction of railways the attention of Congress was called thereto, and it was solicited to grant rights of way and material aid and subsidies, and the manner in which it complied therewith is shown by a reference to the various acts intended to effect that purpose.

The Act of May 9th, 1828 (4 *Stats.*, 268), which is the foundation Act, provides as follows:

"That the assent of Congress to the constructing a railroad by a company incorporated by the Legislature of Maryland, from Baltimore to the City of Washington, be and the same is hereby given, to the extent that Congress has jurisdiction of the soil over which it may pass; conceding to said company to exact such tolls, and to enjoy such benefits and privileges as the act of incorporation of the State of Maryland gives to said corporation within the limits of the State of Maryland."

The Act of March 2d, 1831 (4 *Stats.*, 476), provided that—

"The Baltimore & Ohio Railroad Company, incorporated by said Act of the General Assembly of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad, and may exercise the right of eminent domain to secure the desired roadway."

The Act of March 3d, 1835 (4 *Stats.*, 778), provided that—

"The president, directors and stockholders, organized in virtue of an act of incorporation from the Governor and legislative council of the Territory of Florida, be and they are hereby authorized to construct said road upon the public lands of the United States, so far as the line of said road has been or shall be made to pass through the same, and that there be granted to the said railroad company the lands over which the said road shall pass, and thirty feet on each side of the same * * * That the foregoing provisions shall extend to two companies organized under the authority of Acts of the Legislature of Alabama, and of the Governor and legislative council of the Territory of Florida, and also another railroad authorized by Acts of the legislature of the State of Georgia and the Territory of Florida."

The Act of Congress of April 29th, 1836 (5 *Stats.*, 17), provided that—

"The Western Railroad Corporation be and they are hereby authorized to construct a railroad on lands belonging to the United States in Springfield, Massachusetts, and taking for the security and accommodation of said railroad or the accommodation of the business thereon a strip of land thereof from said lands of the United State not exceeding eighty feet in width."

The Act of Congress of July 1st, 1836 (5 *Stats.*, 63), provided that the Winnessimet Company in the Commonwealth of Massachusetts—

"be and they are hereby authorized and empowered * * * to lay out and make a way or street over the lands of the United States situated in Chelsea in said Commonwealth, not exceeding fifty feet in width."

The Act of Congress of July 1st, 1836 (5 *Stats.*, 63), authorized the Shenandoah Bridge Company at Harper's Ferry to erect a bridge on lands belonging to the United States at or near the town of Harper's Ferry.

The Act of Congress of July 2d, 1836 (5 *Stats.*, 65), provided that—

"There be and is hereby granted to the New Orleans and Nashville Railroad Company, incorporated by the several States through which the said road is intended to pass, the right of way through such portions of the public lands as remain unsold, provided that the portion of the public lands occupied therefor shall not exceed eighty feet in breadth."

The Act of Congress of January 31, 1837 (5 *Stats.*, 154), provided that

"The East Florida Railroad Company, a corporation established by the act of the Governor and legislative council of the Territory of Florida, are authorized to locate and construct a railroad, and whenever the said route shall pass over the public lands of the United States, to locate the same thereon eighty feet wide. That it shall be lawful for the Governor and legislative council of the said Territory, or for the Legislature of the State of Florida hereafter, to provide by law for the construction of railroads from the Georgia State line to the Gulf of Mexico, and that the Territory or State of Florida shall, at the end of twenty years, have the privilege of taking one-fourth of the stock at par, by paying to the company the interest on the investment."

The Act of Congress of March 3d, 1837 (5 *Stats.*, 196), provided that

"There be and is hereby granted to the Atchafalaya Railroad and Banking Company, a corporation created by the Legislature of the State of Louisiana, the right of way through such portions of the public lands as the road or roads of said company is authorized by its charter to construct shall pass, provided that the portion of the public lands occupied therefor shall not exceed eighty feet in width."

The Act of Congress of March 3d, 1837 (5 *Stats.*, 197), provided as follows:

"That there be, and is hereby granted to the New Orleans and Carrolton Railroad Company, incorporated by the Legislature of Louisiana, the right of way through such portions of the public lands remaining unsold, for the extension of their railroad, from Carrolton to the town of Bayou Sara in said State, provided that the portion of the public lands occupied therefor shall not exceed eighty feet in breadth."

The Act of Congress of January 18th, 1838 (5 *Stats.*, 245) gave to the Territory of Wisconsin odd sections of land for the purpose of constructing a canal, and provided

"That so soon as the route of the said main canal shall be definitely located and used agreeably to the Act of the Legislature of said Territory, incorporating the Milwaukee and Rock River Canal Company, it shall be the duty of the Governor to transmit a plat of the same, &c."

The Act of Congress of June 28, 1838 (5 *Stats.*, 253), provided that

"The Act passed by the legislative council of Florida, entitled 'An Act to incorporate the Florida Peninsula Railroad and Steamboat Company,' be and the same is hereby ratified and confirmed, and that the right of way not to exceed eighty feet in width, shall be, and is hereby granted to said company over and through any of the public lands over which the said road may pass; and that Congress may at any time, until said Territory shall be admitted as a State, prescribed and regulate the tolls to be received by said company, and after said Territory shall be admitted as a State, the Legislature thereof shall possess the like power."

The Act of Congress of September 20th, 1850 (9 *Stats.*, 466), granted to the State of Illinois a right of way for a railroad and branches, and also alternate sections of land, and provided as follows:

"That in order to aid in the construction of said Central Railroad from the mouth of the Ohio River to the City of Mobile all the rights, privileges and

liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi respectively."

The Act of Congress of August 4th, 1852 (10 *Stats.*, 28), provided:

"That the right of way shall be and is hereby granted to all rail and plank roads, or macadamized turnpike companies, that are now or that may be chartered within ten years hereafter, over and through any of the public lands of the United States over which any rail or plank road or macadamized turnpikes are or may be authorized by an Act of the Legislature of the respective States in which public lands may be situated to the extent of one hundred feet in width."

The provisions of this Act were extended by the Act of March 3d, 1855 (10 *Stats.*, 683),

"to all the public lands of the United States in the Territories of the United States,"

and the term of said Act of August 4th, 1852, was by the Act of July 15th, 1862 (12 *Stats.*, 577), extended for five years from the 4th day of August, 1862.

This last Act also gave the right of way for a railroad through the public lands in the State of Oregon to the Oregon Steam Navigation Company.

The provisions of this last-named limited Act were again enlarged by the Act of March 3d, 1875 (18 *Stats.*, 482), which provided that—

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, * * * * * to the extent of one hundred feet on each side of the central line of said road * * that the Legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned, and, where such provision shall not have been made, such condemnation may be made in accordance with section three of the Act entitled 'An Act to aid in the construction of railroad and telegraph lines from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same, approved July 1, 1862.'"

The Act of Congress of July 2, 1864 (13 *Stats.*, 364), granted a right of way to the Burlington & Missouri River Railroad Company, a corporation organized under and by

virtue of the laws of the State of Iowa, to extend its road through the Territory of Nebraska.

The Act of Congress of July 12, 1866 (14 *Stats.*, 64), granted a right of way through the public lands of the United States to the Humbolt Canal Company.

The Act of Congress of July 13, 1866 (14 *Stats.*, 94), granted a right of way to the Placerville & Sacramento Valley Railroad Company, a corporation existing under the laws of the State of California, and designated by the Legislature thereof to construct the road hereinafter named.

The Act of Congress of July 23, 1866 (14 *Stats.*, 211), granted a right of way through the public lands to the St. Joseph & Denver City Railroad Company, a corporation organized under the laws of the State of Kansas.

The Act of Congress of July 25, 1866 (14 *Stats.*, 239), granted a right of way through the public lands to the California & Oregon Railroad Company, organized under an Act of the Legislature of the State of California, and such companies organized under the laws of Oregon as the Legislature of said State should thereafter designate, and also gave them a right to every alternate section of land and then provided:

"That the said California & Oregon Railroad Company and the said Oregon Company shall be governed by the provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph lines hereinbefore authorized, in all matters not provided for in this Act."

The Act of Congress of February 5, 1867 (14 *Stats.*, 287), granted a right of way to the Baltimore & Potomac Railroad Company, incorporated by an Act of the General Assembly of Maryland.

The Act of Congress of March 2, 1867 (14 *Stats.*, 548), granted a right of way to the Stockton & Copperopolis Railroad Company, a corporation organized under the laws of the State of California.

The Act of Congress of May 28, 1868 (15 *Stats.*, 60), granted a right of way to the Whitehall & Plattsburgh Railroad Company in the State of New York.

The Act of Congress of March 3, 1868 (15 *Stats.*, 325), granted a right of way to the Walla Walla & Columbia River Railroad Company, a corporation existing under the laws of the Territory of Washington, and provided:

"That this grant is made upon the express condition that any effort by said company hereafter to obtain any land grant, subsidy, or pecuniary aid from the United States Government shall work a forfeiture of this grant."

The Act of Congress of December 15th, 1870 (16 *Stats.*, 395), granted a right of way to the Utah Central Railroad Company, a corporation created under the authority of the legislative assembly of the Territory of Utah.

The Act of Congress of January 1st, 1872 (17 *Stats.*, 202), granted a right of way to the Dakota Grand Trunk Railway Company, a corporation organized under the laws of Dakota.

The Act of Congress of June 1st, 1872 (17 *Stats.*, 212), granted a right of way to the Utah, Idaho and Montana Railroad Company, a corporation organized under the laws of the Territory of Utah.

The Act of Congress of June 4th, 1872 (17 *Stats.*, 224), granted a right of way the Great Southern Railway Company, a corporation created under the laws of the State of Florida.

The Act of Congress of June 7th, 1872 (17 *Stats.*, 280), granted a right of way to the Jacksonville and St. Augustine Railroad Company, a corporation created under the laws of the State of Florida.

The Act of Congress of June 8th, 1872 (17 *Stats.*, 339), granted a right of way to the Denver & Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado.

The Act of Congress of March 3, 1873 (17 *Stats.*, 612),

granted a right of way to the Utah Northern Railroad Company, a corporation organized under the laws of the Territory of Utah.

It is apparent, therefore, that Congress has for seventy-seven years continuously exercised its bounty in favor of turnpike, canal, bridge and railway corporations, created and organized solely under the laws of the various States and Territories. Research has failed to disclose that it has ever been pretended, argued or decided that any one of these thirty-two corporations accepting this bounty, was thereby created a Federal corporation or absolved from its allegiance to the laws of the State, or that the State was thereby deprived of its lawful power over it.

The bounty of Congress next took the form of donations of alternate sections of land to the various Territories and States, for the purpose of aiding in the construction of railroads in such States and Territories respectively. The general provisions of such grants are alike in the several Acts, and nothing further is needed in this regard than to refer to the Acts themselves.

The Act of June 29, 1854 (10 *Stats.*, 302), granted such sections to the Territory of Minnesota.

The Act of May 15, 1856 (11 *Stats.*, 9), granted such sections to the State of Iowa.

The Act of May 17, 1856 (11 *Stats.*, 15), granted such sections to the State of Florida.

The Act of June 3, 1856 (11 *Stats.*, 17), granted such sections to the State of Alabama.

The Act of June 3, 1856 (11 *Stats.*, 21), granted such sections to the State of Michigan.

The Act of August 11, 1856 (11 *Stats.*, 30), granted such sections to the State of Mississippi.

The Act of March 3, 1862 (12 *Stats.*, 772), granted such sections to the State of Kansas.

The Act of May 5, 1864 (13 *Stats.*, 64), granted such sections to the State of Minnesota.

The Acts of May 5, 1864 (13 *Stats.*, 66), granted such sections to the State of Wisconsin.

The Act of May 12, 1864 (13 *Stats.*, 72), granted such sections to the State of Iowa.

The Act of June 25, 1864 (13 *Stats.*, 183), granted such sections to the State of Wisconsin, for a military wagon road.

The Act of July 1, 1864 (13 *Stats.*, 339), granted such sections to the State of Kansas.

The Act of July 2, 1864 (13 *Stats.*, 355), granted such sections to the State of Oregon for the construction of a military wagon road.

The Act of July 4, 1866 (14 *Stats.*, 83), granted such sections to the State of Missouri.

The Act of July 4, 1866 (14 *Stats.*, 87), granted such sections to the State of Minnesota.

The Act of July 23, 1866 (14 *Stats.*, 210), granted such sections to the State of Kansas, for the use and benefit of the St. Joseph & Denver Railroad Company.

It is obvious, again, that the donations of alternate sections of land to the States to aid in the construction of railways was not, upon the face of the Acts making the donations, intended to create the railways when constructed Federal corporations, or to withdraw them from the domain of the State, or to release them from obedience to its laws, and "it is an unbending rule that a grant of corporate existence is never implied." (*Central Railroad* v. *Georgia*, 92 *U. S.*, 670.)

Congress thereafter commenced to create for itself railway corporations, and, in so doing, to bestow upon them the same rights of way, and the same grants of land as had been given by prior Acts either to the State or Territorial corporations directly, or to the States and Territories

for the purpose of aiding the construction of railways therein.

This change in the action of Congress originated in the passage of the Act of March 3, 1853 (10 *Stats.*, 219), in the following section of the General Appropriation Act of that year:

"That the Secretary of War be and he is hereby authorized, under the direction of the President of the United States, to employ such portion of the corps of Topographical Engineers, and such other persons as he may deem necessary, to make such explorations and surveys as he may deem advisable, to ascertain the most practicable and economical route for a railroad from the Mississippi River to the Pacific Ocean, and that the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, be and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, to defray the expense of such explorations and surveys; that the engineers and other persons employed in such explorations and surveys shall be organized into as many distinct corps as there are routes to be surveyed, and their several reports shall be laid before Congress on or before the first Monday in February, 1854."

By the act of July 1, 1862, (12 *Stats.*, 489) Congress incorporated the Union Pacific Railroad Company, giving to it a corporate organization, with all the capacities needed therefor, a right of way through the public lands, alternate sections of such lands, and the bonds of the United States to aid in the construction of the road.

On the 2d of July, 1864, Congress (13 *Stats.*, 365) incorporated the Northern Pacific Railroad Company, giving it similar privileges, rights of way, and sections of land, and provided:

"That the said company is authorized to accept to its own use any grant, donation, loan, power and franchise which may be granted to or conferred upon such company * * * * by the Legislature of any State, or by any corporation, person or persons."

On July 25, 1866, Congress (14 *Stats.*, 236) granted to the State of Kansas alternate sections of land for the purpose of aiding the construction of the Kansas and Neosho Valley Railroad Company, and provided as follows:

"That any railroad Company, chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter

be recognized and subsidized by any Act of Congress of the United States may connect, unite and consolidate with this railroad company after the same shall be located to the valley of the Neosho River, upon just, fair and equitable terms to be agreed upon between the parties, and shall not be against the public interest, or the interest of the United States; provided that the right of way through private property, when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained in accordance with the provisions of the act incorporating the Union Pacific Railroad Company."

On July 26, 1866, Congress (14 *Stats.*, 289) passed an Act granting to the Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas, alternate sections of land and a right of way, and provided:

"That any railroad company chartered under any law of the United States, or of any State, which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite and consolidate with this railroad company after the same shall be located to the valley of the Neosho or Grand River, upon just, fair and equitable terms, to be agreed upon between the parties, as shall not be against the public interests or the interests of the United States."

On July 27, 1866, Congress (14 *Stats.*, 292) incorporated the Atlantic and Pacific Railroad Company, giving it a right of way and alternate sections of land.

On March 2, 1869, Congress (15 *Stats.*, 324) authorized the Union Pacific Railway Company, Eastern Division, to contract with the Denver and Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line between Denver City and Cheyenne, and provided:

"That nothing herein shall authorize the said Eastern Division Company to operate the road, or fix the rates of tariff for the Denver and Pacific Railway and Telegraph Company: provided further, that neither of the companies shall be entitled to a subsidy in United States bonds."

On March 3, 1871, Congress (16 *Stats.*, 573) incorporated the Texas Pacific Railroad Company, giving them a right of way, and alternate sections of land.

It is obvious, again, that there is no provision in any of these acts of incorporation which, upon its face, absolves the several railway companies, thus incorporated by Congress, from observing the laws of the State, which are passed in the interest of the public generally or under the police power of the State, and in aid of the general welfare of the people of the State.

The History of the Kansas Pacific.

The Territorial Legislature of Kansas, at its session of 1855, passed, as chapter 28 of its laws, a statute, which contained, among other things, the following:

"§ 7. The charter of every corporation that shall hereafter be granted by law shall be subject to alteration, suspension or repeal by any succeeding Legislature."

The same Legislature passed at the same session, and as Chapter 86 of its laws, the Act which incorporated the Leavenworth, Pawnee & Western Railroad Company in these words:

Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas, as follows:

Section 1. A company is hereby incorporated called the Leavenworth, Pawnee & Western Railroad Company, the capital stock of which shall be five millions of dollars, to be divided into shares of fifty dollars each; the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make and use a common seal and change and alter the same at pleasure, and shall be able in law and equity to make contracts; may take, hold, use, possess and enjoy the fee simple or other title in and to any real estate, necessary to carry out the provisions of this act, and no more, and may sell, convey, pledge, mortgage or dispose of the same; may make by-laws, rules and regulations proper and necessary for carrying into effect the provisions of this act, not repugnant to the Constitution or laws of the United States or of this Territory, and shall have the usual and necessary powers of companies for such purposes.

Sec. 2. W. H. Russell, J. Marion Alexander, S. D. Lecompte, Amos Rees, James Davies, W. F. Dyer, Robert Wilson, James Findlay, E. S. Wilhoit, Edward H. Dennis, C. H. Grover, Wilburn Christison, M. P. Rively, Charles Hayes, and Cornelius M. Burgess, or any five of them, shall constitute the first board of directors under this act, and shall hold their office until

their successors shall be qualified; they shall, within five years from the date of the passage of this act, meet at such time and place as shall be designated by any three of them, and organize as a board of directors; and when organized, they shall cause books to be opened for subscription to the capital stock of the said company, at such time and place as they may designate, under the supervision of such persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such books when necessary until the whole stock shall be subscribed.

SEC. 3. So soon as three thousand shares shall be subscribed, the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in two or more public newspapers.

SEC. 4. An election for nine directors shall be held on the first Monday in April in each year, and, if not held on that day, an election may be held at any other time that the directors shall designate; the election shall be held under the supervision of three or more stockholders, and the persons receiving the highest number of votes shall be elected, and shall continue in office until their successors be qualified; every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy; soon after the election, the directors shall meet and elect one of their number as president, who shall hold his office for the term for which he was elected director, and until his successor shall be qualified.

SEC. 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company, and shall keep a journal of their proceedings, and shall cause correct books and accounts to be kept; they may determine by law what number of directors shall constitute a quorum, may appoint committees, and fill all vacancies in any office under said company; they shall fix the salaries of the president, and the officers and agents; they may take security of their officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

SEC. 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper, and if any stockholder shall fail to pay any such requisition within ten days after the time of payment, the said company shall recover the same with interest, and if not collected may direct the stock forfeited, and sell the same, and no delinquent stockholder shall vote in said company.

SEC. 7. Said company shall have full power to survey, work, locate, and construct a railroad from the west bank of the Missouri river, in the town of Leavenworth, in this Territory; and from thence west to the town of Pawnee, or to some point feasible, and near to the Government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the Territory, and for that purpose may hold a strip of land, not exceeding one hundred feet in width, with as many set of tracks as the said president and directors may deem necessary: *Provided*, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses and water stations, and may extend branch railroads to any point in any of the counties through which the said road may be located; and said company shall have power to construct a branch road from any point in the main trunk

of said road to the town of Kickapoo, on the Missouri river; no discrimination shall be made between the main trunk of said railroad and the branches connecting with the same, in regard to the rates of passage and the charges for freight shipped over the same.

SEC. 8. Said company shall take voluntary relinquishments of the right of way for said road, and the necessary depots and water stations; and if the land through which said road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minors shall have power to convey to said company so much of the land as may be necessary for the purposes aforesaid, on fair and equitable terms, but every such relinquishment shall be subject to the approval or rejection of the Probate or other Court in which such guardianship is pending. If any owner of any tract of land through which said railroad shall pass, shall refuse to relinquish his right of way for said railroad to said company, or the necessary land for depots, engine or wood houses, water station, stopping stages, or turn-outs, or if the owners be infants, or persons of unsound mind, or non-residents of the Territory, the facts of the case shall be especially stated to the Judge of the District Court of the county, or presiding Judge of the Court of Common Pleas of the county, as the case may be, in which such lands are situated, and said Judge shall appoint three disinterested citizens of the county in which said lands are situated to view said lands, who shall take into consideration the value of the land, and the advantages and disadvantages of the road to the same, and shall report, under oath, what damages will be due to said lands or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned; notice of such application to such Judge shall be given to the owner of such land five days before the making of the application, if such owner reside in this Territory, or to his guardian; and if such owner be a non-resident of this Territory, he may be served with actual notice, or by an advertisement for four weeks in some public newspaper.

SEC. 9. The persons appointed to view and value such lands shall file their report and plat in the office of the Clerk of the District Court or Court of Common Pleas, as the case may be, of the county in which the land or a part thereof is situated; and if no valid objections be made to said report, the Court shall enter judgment in favor of such owner against said company, for the amount of damages assessed, and shall make an order vesting in said company, in fee simple, title of the land in such plat and report described. Objections to such report must be filed within ten days; after the same shall have been filed, said objections shall be examined by said Judge, in term-time or vacation, and he may hear testimony, and by judgment confirm said report, or he may set the same aside, and appoint three other viewers, who shall proceed in the same manner, and make a report, until a report is confirmed: *Provided*, In order that the progress of the work may not be impeded, that after said owners have filed their report and plat in the office aforesaid; the company, after having made a tender of the amount of damages to the person or persons entitled to the same, or made a deposit of the amount with the clerk of the Court in which the case may be pending, shall be authorized to proceed in the construction of the work as fully as though no disagreement had arisen. In all such cases the Court shall adjudge the costs of the proceedings according to equity, and the Court shall have power to make such orders, and take such other steps as will promote the ends of justice between the owners of such

lands and the said company; and the said viewers shall be entitled to the same fees as are allowed to commissioners in partition under the statute.

SEC. 10. Said company may build said road along or across any public road, or street, or wall of any town or city, and over any stream or highway; but whenever said road shall cross any public road, said company shall keep good and sufficient cause-ways, or other adequate facilities for crossing the same; and said road shall not be so constructed as to prevent the public from using any road, street or highway, along or across which it may pass; and when said railroad shall be built across any navigable stream, said company shall erect a bridge sufficiently high on which to cross, or shall construct a draw-bridge, so that in no case shall the free navigation of such stream be obstructed. When any person shall own lands on both sides of said road, said company, when required so to do, shall make and keep in good repair one causeway, or other adequate means of crossing the same.

SEC. 11. Said company shall commence the construction of said road within five years, and shall complete the same within twelve years thereafter; and said company shall have general power to use, manage, control, and enjoy said road; shall determine what kind of carriages shall be used thereon, and by whom, or in what manner; and shall determine the terms, condition and manner in which merchandise, property and passengers shall be transported; and shall have power to construct and keep such turn-outs, gates, culverts, toll-houses, depots, warehouses, causeways, and other buildings, machinery and fixtures, as may be necessary. Said company may receive such tolls and freights as may be determined upon by the directors, and shall keep posted up in their depots estimates of the rates of tolls and freight charged..

SEC. 12. Dividends of so much of the profits of said company as shall appear advisable to the directors shall be declared semi-annually, and be paid to the stockholders or their legal representatives, on application at the office of said company, at any time after the expiration of ten days, from the time of declaring the same; but the dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby; and if the said directors shall make any dividend which shall impair the capital stock of the company, the directors consenting thereto shall be liable, in their individual capacities, to the company for the amount of capital stock so divided; and each director present when such dividend shall be declared, shall be considered as consenting thereto, unless he immediately enter his protest on the minutes of the board, and give public notice to the stockholders of the declaring of such dividends.

SEC. 13. At every annual meeting of said company the directors shall make to the stockholders an exhibit of the affairs and condition of the company; one-tenth part in interest of all the stockholders may call a meeting by giving four weeks' notice in two public newspapers.

SEC. 14. When said road shall be completed, the company shall file a plat thereof in the office of the Secretary of the Territory, or of the State or States, as the case may be, and the Legislature may at any time require a statement from the company as to the progress of the work, the amount of business, and the receipts of the company; and the books and accounts of said company may at any time be investigated by a committee appointed by the General Assembly; and the said corporation shall make an annual report to the Secretary of the Territory, or of the State or States, as the case may be, of the operations of the

year ending on the first day of December, which report shall be verified by the oaths of the treasurer and acting superintendent of operations, and filed in the office of the Secretary of the Territory, or of the State or States, as the case may be, by the third Monday in December, in each year, and shall state: *first*, the capital stock and the amount actually paid in; *second*, the amount expended for the purchase of land for the construction of the road, for buildings, and for engines and cars, respectively; *third*, the amount and nature of its indebtedness, and the amount due the corporation; *fourth*, the amount received for the transportation of passengers, of mails, of property, and from all other sources; *fifth*, the amount of freight, (specifying the quantity in tons,) of the products of the forest, of animals, of vegetable food, other agricultural products, manufactures, merchandise, and other articles; *sixth*, the amount paid out for repairs; *seventh*, the number and amount of dividends, and when made; *eighth*, the number of engine houses and shops, of engines and cars, and their character; *ninth*, the number of miles run by passenger, freight and other trains, respectively; *tenth*, the number of men employed, and their occupations; *eleventh*, the number of persons injured, in life or limb, and the cause of such injuries; *twelfth*, whether any accidents have arisen from carelessness or negligence of any person in the employment of the corporation, and whether such person is retained in the service of the corporation.

SEC. 15. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any incorporated city, town, or incorporated company may subscribe to the stock of said company, and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of such city, town or corporation.

SEC. 16. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State or States through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued by persons to be mutually chosen by the State and by said company; but two years' notice shall be given to said company of the intention of the State to purchase said railroad.

SEC. 17. When any person ceases to be a stockholder, he shall cease to be a member of said company.

SEC. 18. If any person shall willfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixtures or improvement belonging to said company, he shall be considered guilty of a criminal offense, and shall be punished in such manner as shall be prescribed by law; and shall also be liable to said company for all damages by it sustained.

SEC. 19. The operations of said company shall be confined to the general business of locating, constructing, making and using said railroad, and the acts necessary or proper to carry the same into complete and successful operation.

SEC. 20. The stock of said company shall be considered personal property,

and shall be assignable and transferable according to such rules and restrictions as the board of directors shall, from time to time, make and establish, subject, however, to the laws of the Territory, or any future State erected out of this Territory, as the same may be made. In case that it shall happen at any time, that an election of directors shall not be made on any day when, pursuant to this act or any regulations of said company, it ought to have been made, the said corporation shall not for that cause be deemed dissolved; but it shall and may be lawful on any other day, to make and hold an election of directors in such manner as shall be regulated by the by-laws and ordinances of the company.

SEC. 21. Said company shall have power to receive and hold loans, gifts, grants, and donations of land, money or bonds, in any quantity, from this Territory, or from any future State erected out of this Territory, or the United States; and may sell, convey, pledge, mortgage, or otherwise dispose of said land, moneys, or bonds, or any part thereof, and apply the proceeds of the same to the construction of said railroad.

This act to take effect and be in force from and after its passage.

This Act created, as a railway corporation, a continuous body politic, with all the powers incident thereto, with a capital stock of $5,000,000 divided into shares of $50 each, which shares were declared

"to be personal property, and, as such, assignable and transferable according to such rules and regulations as the board of directors shall from time to time make and determine, subject however to the laws of the territory, or any future State erected out of the territory, as the same may be made";

and with power in the company to

"receive and hold loans, gifts, grants, and donations of land, money, or bonds from the United States";

and, when so received and held,

"to sell, convey, pledge, mortgage or otherwise dispose of the same, and apply the proceeds to the construction of said railroad."

It is to be observed that no authority to mortgage the franchise was given by this charter.

On the 23d of February, 1857, the Territorial Legislature passed a supplement to this charter, continuing and extending it under the same restrictions and giving authority to the company to increase the capital stock to $10,000,000.

On the 29th of January, 1861, Kansas was admitted as a State, under its Constitution, adopted July 29, 1859. Such Constitution contained these provisions:

"That no inconvenience may arise from the change from a territorial government to a permanent State government, it is declared by this Constitution

that all suits, rights, actions, prosecutions, recognizances, contracts, judgments, and claims, both as respects individuals and bodies corporate, shall continue as if no change had taken place. All laws and parts of laws in force in the the territory at the time of the acceptance of this Constitution by Congress, not inconsistent with this Constitution, shall continue and remain in full force, until they expire or shall be repealed."

The enquiry now arises, what effect, if any, did this change in the political organization of Kansas under this Constitution have upon the charter of the Leavenworth, Pawnee and Western Railroad Company, or upon the corporation thereby created? This is answered by the decisions of the Supreme Court.

In *Railroad Co.* v. *Kountz* (104 *U. S.*, 10) it appeared that the Baltimore & Ohio Railroad Co. was incorporated by the State of Maryland, and that subsequently the State of Virginia granted the same rights and privileges to the company in Virginia that had been granted to it in Maryland. This Act of the State of Virginia was held by the Courts of that State to constitute the company a Virginia corporation as to so much of its road as was within the territory of Virginia. The western portion of that State subsequently separated from the State of Virginia, and was erected into and became a new State under the name of West Virginia. Speaking of this state of facts the Court said:

"Even conceding that the company was once a Virginia corporation, so far as its original road in that State was concerned, the most that can be said of it now is that, in common with all citizens of the old State residing in the ceded territory, its citizenship was transferred, by the organization of West Virginia, from the old State to the new. Consequently, if it was once a corporation of Maryland and Virginia, it is now a corporation of Maryland and West Virginia. Any citizenship it may have had in Virginia has been lost."

This was said of a corporation, and it affirms that a corporation created by one State becomes, when a new State is carved out of the original State, and without any act on the part of the new State, a corporation, and, for the purposes of jurisdiction, a citizen also of the new State. The effect of this citizenship will be considered hereafter. It may be said in passing, however, that it is plain from the

language used that the citizenship follows the political change in the Government by which the corporation was created, and that, if a new political body is created, such creation confers citizenship upon all corporations antecedently created and continuing to conduct their business within the domain of such latter body.

If this be true of a corporation of a State created from within the boundaries of a pre-existing State, it is equally true of a corporation of a State created from and out of the boundaries of a pre-existing Territory, the laws of which had given to such corporation its legal existence.

It follows, therefore, as simple matter of law, that whatever was a legal corporation within the Territory of its creation becomes, if the act of incorporation remains in force, a corporation also of the newly-formed and admitted State.

The provisions of the Constitution of Kansas last above quoted, providing for a continuation of Territorial laws, and of all rights thereunder, had their exact prototype in the Constitution of Indiana, and in a general law of the State of Iowa, passed in aid of its State Constitution.

The language of the Constitution of Indiana is as follows:

"That no evils or inconvenience may arise from the change of a Territorial Government to a permanent State Government, it is declared by this Constitution that all rights, suits, actions, prosecutions, recognizances, contracts, and claims, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government."

Indiana was originally a Territory, having, instead of a special act authorizing its Legislature to pass laws, the legislative powers given by the Ordinance of 1787. The Territory incorporated the Board of Trustees of the Vincennes University. After Indiana became a State, the status of this corporation became the subject of investigation and decision by the Supreme Court. (*Trustees* v. *State of Indiana*, 14 *How.*, 272.) The Court said:

"The same rights and powers as existed under the Territorial Government were secured by the first section of the 12th Article of the Constitution of Indiana." * * *

The use of the word "secured" was undoubtedly intentional, and paraphrased it means, "were ratified and confirmed to the corporation by virtue of the 12th Article of the Constitution of Indiana."

In *Rogers* v. *Burlington* (3 *Wall.*, 662) the charter of the Railway Company was granted by the Legislature of the Territory of Iowa acting under its organic act. The Constitution of the State as originally adopted provided that all laws in force in the Territory which were not repugnant to the Constitution should remain in force until they expired by their own limitation, or should be repealed by the General Assembly of the State. The Court said:

"When the new Constitution was adopted it contained no such provision. But the omission was shortly afterwards substantially supplied by a general law, re-enacting and reviving all acts in force at the time it went into effect. In considering this question, it will not be necessary again to advert to the fact that the charter was granted by the Territorial Legislature, because it has already been shown that it has the same validity that it would have had if it had been re-enacted by the Legislature of the State."

In *Scott* v. *Iowa* (5 *How.*, 343), it was claimed that the defendant in error, the Detroit Young Men's Society, was not lawfully incorporated by the State of Michigan. The act of incorporation by that State purported to have been passed and approved on the 26th of March, 1836. Michigan was originally a part of the old Northwest Territory. When that Territory was divided in 1800, it was made to constitute a part of the Indiana Territory. In June, 1805, it was erected into a separate Territory and its seat of Government established at Detroit. On the 15th of June, 1836, three months after the act of incorporation of the Detroit Young Men's Society, Congress passed an Act to provide for the admission of the State of Michigan into the Union, and on the 26th of January, 1837, the State was formally admitted.

The Court said:

"After such bodies are recognized as having been duly organized, and are admitted into the Union, the judicial tribunals of the General Government,

which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State within the meaning and spirit of the Judiciary Act."

These decisions judicially establish the right of a Territorial Legislature to incorporate a railway corporation. Such incorporation, moreover, as a proper exercise of the political and legislative power, has been conceded from the earliest period by Congress, which has continuously and habitually granted rights of way to such corporations. If a further authority be needed, it is to be found in *Miner's Bank* v. *Iowa* (12 *How.*, 41), in which the Court said:

"By what may be termed the organic laws creating the government of the Territories, those governments were vested with general legislative power, and were subjected to no enumerated or specific limitations of that power, save in certain exceptions applicable to the lands or other property of the United States, and to the right on the part of those governments in exercising the power of taxation to discriminate between the property of residents and non-residents."

The charter of the Leavenworth, Pawnee and Western Railroad Company was never declared forfeited, and it was therefore definitively extended and continued by an Act passed by the State of Kansas in 1861, after its admission as a State, which provided for the extension and continuation of all railway charters which had not been declared forfeited.

On the 4th of June, 1861, an Act was passed by the State Legislature further recognizing the Leavenworth, Pawnee and Western Railroad Company and authorizing it to change its name to the Leavenworth, Fort Riley and Western Railroad Company. The company never adopted or ratified this change (*Mr. Ewing's Letter*).

By an Act passed March 4th, 1862, the State further recognized the corporation by authorizing any railroad company

"now organized under the laws of the State or Territory of Kansas, to mortgage its property together with the franchise of said road, for the liquida-

tion of any indebtedness said railroad company may incur in the construction of said road."

This was the first law by which such companies were authorized to mortgage their franchises.

It is to be observed here that without legislative authority, a railway corporation cannot mortgage its franchises. (*Pullan* v. *Cincinnati*, 4 *Biss.*, 35, 42; *Monawitz on Private Corporations*, § 538; *Boone's Law of Corporations*, § 179; *Jones on Railroad Securities*, § 3; *Branch* v. *Jesup*, 106 *U. S.*, 478, 484; *Gue* v. *Tide*, 24 *How.*, 257.)

In *Thomas* v. *Railroad Co.* (101 *U. S.*, 71, 83) the Court said:

"The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

The State incorporation and charter of the Leavenworth, Pawnee and Western Railroad Company is thrice recognized by the Union Pacific Act of 1862, and in sections 9, 10 and 13 thereof in these words:

"Sec. 9. And be it further enacted that the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized, &c., * * and said Kansas Company. Sec. 10. That the said company chartered by the State of Kansas, * * * Sec. 13. And the Leavenworth, Pawnee and Western Railroad Company may construct their railroad from Leavenworth, &c."

It is to be observed that there is no authority in the Union Pacific Act of 1862 to mortgage either property or franchise.

On February 20, 1883, the House of Representatives passed a resolution containing, among other things, the following:

"Resolved, that the Secretary of the Interior be requested to furnish this House as early as practicable the following papers, relating to the Leavenworth, Pawnee and Western Railroad Company, or its legal successors, viz.:

1. A copy of the assent to the Act of July 1, 1862, as filed by and under the seal of the said company, showing date when the same was filed. 2. Fac-simile copy of the original map and other papers designating the general route of said road, and date when same was filed. 3. Copy of the record showing when the line of said road was surveyed and definitely fixed."

The Secretary of the Interior made the report required on the 26th of February, 1883 (*Ex. Doc.*, No. 95), which contained schedules, showing compliance by the Leavenworth, Pawnee and Western Railroad Company with the requirements of the Act of July 1, 1862, as follows:

"Nov. 14, 1862.—At a called meeting of the directors of the Leavenworth, Pawnee and Western Railroad Company, held this day at the office of the said company at the City of Leavenworth, at which were present T. H. McDowell, president, T. C. Stone, Amos Rees, A. J. Isacks, and R. P. C. Wilson. The president in the chair. The following resolution by A. J. Isacks, was unanimously adopted, viz.: Resolved on this Nov. 14, A. D., 1862, that the Leavenworth, Pawnee and Western Railroad Company hereby accept the conditions of an Act of Congress entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862, so far and fully as the same relates to said company, and that a certified copy hereof be forwarded by the president of the railroad company without delay to the Secretary of the Interior, with a request that the same be filed in the Interior Department as required by said Act, and also a certified copy of the contract of this company made with Messrs. Ross, Steel & Co. for the construction and equipment of the railroad from the Missouri River, at the mouth of Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the one hundredth meridian of longitude west from Greenwich, as is provided in said act. T. H. McDowell, president; Sam. Denman, secretary. I hereby certify the above and within to be a true copy taken by me from the original entry in the books of the company. Sam. Denman, Sec. L., P. & W. R.R. Co. Leavenworth City, Nov. 14, 1862."

The acceptance is stated in the report to have been filed on the 23d day of December, 1862.

There are annexed to the report further documents, as follows:

Washington, D. C., July 4, 1862.—Dear Sir: As attorney for the Leavenworth, Pawnee and Western Railroad Company of Kansas, I hereby make designation of the probable route of the road west of the town of Lawrence, in said State, to-wit: Commencing on the left bank of the Kansas River opposite said town, thence west along said left bank to the left bank of the Republican River; thence along said left bank of the Republican to the one hundredth meridian of longitude west from Greenwich. 2. Commencing on the left bank

of the Kansas River opposite said town, thence west along said left bank to the left bank of the Solomon River; thence up said left bank of the Solomon to the mouth of Delaware Creek; thence in a straight line to the left bank of the Republican at said meridian of longitude. I file herewith maps indicating said proposed routes. I have to request that an order be issued withdrawing the land along both said routes from pre-emption, private entry, and sale, in pursuance of the provisions of the ninth section of the "Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," &c., and as I am informed that large numbers of warrants have lately been sent to the land office at Junction City for location, I specially request that the order to that office be issued as early as possible. If there be doubt as to the power to withdraw along more than one route, I request that the withdrawal be made at once along the route first above indicated, leaving the question as to the withdrawal of the lands along the other route to be afterwards determined. Very respectfully, Thomas Ewing, Jr., as Attorney for the Leavenworth, Pawnee and Western Railroad Company. The Commissioner of the General Land Office.

General Land Office, July 17, 1862.—Gentlemen: The agent of the Leavenworth, Pawnee and Western Railroad Company of Kansas, having filed in this office a map and diagram designating the probable route of said road west of the town of Lawrence in said State, from a point on the left bank of the Kansas River, opposite said town, thence west along the left bank of said river to the left bank of the Republican Fork thereof, thence along the left bank of said Republican Fork to the one hundredth meridian of longitude west from Greenwich, under the provisions of the Act of Congress entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862, you are hereby directed to withhold from "pre-emption, private entry, and sale," all of the public lands situated in your district and lying within 15 miles on each side of said route, as designated on the diagram herewith, marked A, the townships and parts of townships thus withdrawn from sale or pre-emption being indicated thereon by a red color. This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you. Very respectfully, your obedient servant, J. M. Edmunds, Commissioner. Register and Receiver, Atchison, Kans. Note.—The register will carefully lay down the limits of the reservation in lead pencil on the township plats, and make proper notes thereon, so that this order may be strictly observed, and the lands be withheld from sale or entry of any kind. J. M. Edmunds.

On the 6th day of June, 1863, the name of the Leavenworth, Pawnee and Western Railroad Company was duly changed to the "Union Pacific Railroad Company, Eastern Division." The fact of the change is evidenced by the Act of Congress of July 2, 1864, which provides:

"That the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, shall build the railroad from

the mouth of the Kansas River. And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories, when the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, shall have completed their road, then the last named company may proceed to make said road westward."

This change of name was further recognized by the Acts of Congress of July 26, 1866, and March 3, 1869, and was recognized by the Supreme Court in *Thomas* v. *Pacific Railroad* (9 *Wall.*, 579); *United States* v. *Kansas Pacific* (99 *U. S.*, 456); and in (*Western Union Tel. Co.* v. *U. P. R. Co.* (3 *Fed. Rep.*, 14).

It was also recognized by the Interior Department. The report above mentioned further states:

"A map of the general route of the road from the line between Missouri and Kansas, adopted by the Union Pacific Railway Company, Eastern Division, June 23, 1865, was filed in the department July 1, 1865, by John D. Perry, president of the company. No further action was taken on said map. The line thereon is nearly identical with the line marked No. 1 on map herewith. A map of the Union Pacific Railway, Eastern Division, as definitely located, from the Missouri line, at Kansas City, to Fort Riley, was received at this office January 11, 1866, with a letter from W. J. Palmer, secretary and treasurer, dated January 10, 1866. By letter of July 6, 1856, the president of the Union Pacific Railway Company, Eastern Division, filed with the Secretary of the Interior a map of the general route of the road from the meridian of Fort Riley to the western boundary of the State. Map of the definite location of the Union Pacific Railroad, Eastern Division, from Fort Riley to Fort Harker (being from the 130th to 220th mile posts), showing survey from September 15, 1865, to September 27, 1865, certified by the officers of the company, and sworn and subscribed to by the chief engineer, April 30, 1867, was received at the General Land Office. Map of definite location of the Union Pacific Railroad, Eastern Division, giving dates of field work, from September 27, 1865, to October 4, 1865, from Fort Harker to Fort Hays, being from the 220th to the 290th mile posts, certified by the officers of the company, and sworn and subscribed to by the chief engineer September 14, 1867, was received at this office. Map of the definite location of the Union Pacific Railroad, Eastern Division, from the 290th to 335th mile posts, giving dates of field work between October 4, 1865, and October 7, 1865, certified by the officers of the company, and sworn and subscribed to by the chief engineer November 13, 1867, was received at this office. By the Act of Congress approved July 3, 1866, page 79, Pamp. Laws, the line of the Union Pacific Railway, Eastern Division (formerly the Leavenworth, Pawnee and Western), was changed from the Republican Fork to the Smoky Hill Fork of the Kansas River."

How and when the change was made is affirmatively shown by the mortgage of the Kansas Pacific Railway Company of the 20th of June, 1869, which states as follows:

"Whereas, the party of the first part is a corporation originally created by Act of the Legislature of the Territory of Kansas, under the title of the Leavenworth, Pawnee and Western Railroad Company, which title was, on the 6th day of June, 1863, at a regular meeting of the stockholders of the said company, in pursuance of authority given by Act of Legislature of the State of Kansas, duly changed to the Union Pacific Railway Company, Eastern Division, &c."

In 1868, Kansas passed an act concerning corporations, known as "Chapter 23," which provided, among other things, as follows:

"Section 11. Every corporation, as such, has power * * * * Eighth. To increase or diminish by a vote of its stockholders, cast as its by-laws may direct, the number of its directors or trustees, to be not less than three, nor more than thirteen, and may in like manner change its corporate name, without in anywise affecting its rights, privileges or liabilities."

Under this authority the Union Pacific Railroad, Eastern Division, on the 5th of April, 1869, by a unanimous majority vote of its stockholders, changed its name to "Kansas Pacific Railway Company," and duly filed its certificate to that effect in the office of the Secretary of State of Kansas in these words:

At the regular annual meeting of the Union Pacific Railway Company, Eastern Division, a majority of the stock of the Company being represented, held at Lawrence, Kansas, April 5th, 1869, it was unanimously resolved that the name of this company be changed from that of the "Union Pacific Railway Company, Eastern Division," to that of the "Kansas Pacific Railway Company." I hereby certify the above to be a true and correct record of the proceedings of the stockholders' meeting, held at Lawrence, Kansas, April 5th, 1869, as taken from the record books of the company. [Seal.] D. M. Edgerton, Secretary Kansas Pacific R. W. Co., Adolphus Meier, Vice-President.

This change of name was agreed to by Congress (Act of March 3, 1869, 15 *Stats.*, 348). Why this Act of Congress was procured is stated in the second annual report of the Kansas Pacific Railway Company to its stockholders for 1868, as follows:

"The laws of the State of Kansas authorize the name of any railroad within its limits, and the number of its directors, to be changed by the vote of

a majority of the stockholders at any regularly called meeting, your Board deeming it advisable to have the authority of Congress for the change of name obtained the passage of a law at the last session authorizing the name of this company to be changed to that of the Kansas Pacific Railway Company, a more appropriate designation, and it is recommended that, at the present meeting, action be taken making this change, and also increasing the number of your Board of Directors to eleven members."

This *resumé* establishes the identity of the road and incorporation of the Leavenworth, Pawnee and Western Railroad Company with the road and incorporation of the Kansas Pacific Railway Company. Nothing has been changed save the line of the road, which was purposely left undefined, and flexible, both in the original charter and in the two Acts of Congress, of July 1, 1862, and July 2, 1864, and such change was but a question of detail. It also shows that the statutes of Kansas were availed of to effectuate such change, as well as a change in the number of directors of the company.

The effect of such a change was thus stated in *Girard* vs. *Philadelphia* (7 *Wall.*, 1):

"Neither the identity of a corporation, nor its right to hold property, is destroyed by a change of its name, or an enlargement of its area."

It has been urged on former occasions that

"the Leavenworth, Pawnee and Western Railroad Company, has only a paper existence at best. It had no property, no organization even, no capital stock paid in, and had neither built, nor in good faith located a mile of its road."

This is hardly true to the extent asserted. It did have more than a paper existence, because it appears by Mr. Ewing's letter of June 14, 1862, annexed to the defendant's answer, that

"The company was organized in January, 1857, at Leavenworth, by a subscription of $156,700 of stock, and the choice by the stockholders of a board of directors and other officers. Since then, other subscriptions of stock within the limits of the charter have been made, new directors and officers at various times chosen, and the company, pursuant to the provisions of its charter, kept in constant and efficient exercise. The construction of the road was commenced in May, 1857, and in that year surveys and profiles of the main line were made, and the location completed from Leavenworth to Fort Riley."

This disposes of the question of fact. Further than this, there are certain rights and attributes of a corporation which never have anything more tangible and permanent than a paper existence. The right to be a corporation—the right to have perpetual succession—the right to construct a railway—the right to take tolls for freight and passage thereon—the right to exercise the right of eminent domain—the right to accept donations or conveyances of lands from third parties—the right to issue stock—the right to have board of directors—the right to manage and control, through such board, the financial affairs of the company, and to regulate the conduct of its business—and the right to mortgage franchises and property—never in any railway corporation have anything higher or more dignified than a paper existence.

This identity of the corporations, moreover, was conceded in *Railroad Co.* vs. *Peniston* (18 *Wall.*, 48), in which the Court said:

"These considerations show how totally different this case is from that of *Thompson* vs. *Kansas Pacific Railway Co.* That was a State corporation deriving its origin from State laws."

In *Western Union Co.* vs. *P. R. Co.* (3 *Fed. Rep.*, 104) McCrary, *J.*, said:

"It is conceded that the Kansas Pacific Railroad Company, Eastern Division, was originally chartered by an Act of the Legislature of Kansas as the Leavenworth, Pawnee and Western Railroad Company."

The obligations of the original charter and its inalienability were thus stated in *Thomas* vs. *Railroad Co.* (101 *U. S.*, 83), as before cited:

"Where a corporation like a railroad company has granted to it by charter a franchise, intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which it undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter and to relieve the grantees of the burdens it imposes, is a violation of the contract with the State and is void as against public policy."

The effect of the acts stated by Mr. Ewing are more clearly stated in *Commissioners of Douglas County* vs. *Bolles* (94 *U. S.*, 105), as follows.

"Whether the St. Louis, Lawrence and Denver Railroad Company was lawfully a corporation, capable of contracting with the defendants below, is a question that cannot be raised in this case. The findings of the Circuit Court establish that a majority of the persons named as corporators in the certificate filed in the office of the Secretary of State on the eleventh day of May, 1868, published a notice that books would be opened on a designated day for subscriptions to the stock of the company. The books were accordingly opened, subscriptions to the capital stock were made, a meeting of the stockholders ensued, and directors were chosen, together with a president, vice-president, secretary, treasurer and executive committee. This was on the 28th of July, 1868; and from that time corporate meetings have been regularly held, and the company has built and operated a railroad from Lawrence to the Missouri State Line, and has exercised the usual functions of a railroad corporation. It has been a corporation, *de facto*, at least, if not *de jure*, from the date of its organization. Its corporate existence, therefore, and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it."

This was substantially repeated in *Railroad Co.* v. *Alling* (99 *U. S.*, 467, 478), where the Court said:

"On Feb. 15, 1877, Alling, Locke and Megrue became incorporated under the laws of Colorado as "The Cañon City and San Juan Railway Company," with a capital stock of $100,000, for the purpose of constructing and maintaining a railroad from Cañon City, thence up the valley of the Arkansas River through the Grand Cañon thereof, thence, by the most practicable route, following that river to South Arkansas post-office in Lake County, Colorado. The articles of incorporation were filed in the office of the Secretary of State of Colorado, Feb. 19, 1877. The Secretary of the Interior, in an official communication, declared, June 22, 1877, his approval of the proofs of organization filed by that company, and of the map showing the line of its road for a distance of twenty miles. * * * Upon this branch of the case, the first contention of the latter company is that the Cañon City Company was not "duly organized" under the laws of Colorado, and therefore, by the terms of the Act of March 3, 1875, was not entitled to its benefits. But this objection is not well taken. The articles of incorporation filed by that company seem to be in substantial compliance with the Statutes of Colorado. This objection need not be further considered. But its right to claim the benefit of the act of March 3, 1877, is impeached upon the further ground that it was not organized in good faith, for the purpose of constructing a road for itself, but it was the mere instrument of the Atchison, Topeka and Santa Fé Company, by whom the real work of construction through the cañon was carried on. It is not to be doubted under the evidence, that the Atchison, Topeka and Santa Fé Railroad Company is the active power behind all the movements made in the name of the Cañon City Company for the occupation of the cañon, and that the former company, or some of its stockholders, were deeply interested

in the success of the movement to drive the Denver Company from the Grand Cañon. But the Cañon City Company is none the less a railroad company, duly organized under the laws of Colorado. It is, therefore, embraced by the very letter of the Act of March 3, 1875. We are unable to perceive upon what sound principle the Courts can go behind its regular and lawful organization, and exclude it from the rights granted by that act, because in the prosecution of its work it drives assistance or accepts aid from another corporation, with which it may choose to share the benefits secured under the act of Congress."

The Court is now bound to assume, in view of the statement of Mr. Ewing, that this charter was accepted by the company, and this inference is further justified by the various acts of user of the defendants hereinafter set forth, and which, without the charter from the State, would have been unjustifiable. (*Zabriskie* v. *Cleveland*, 23 *How.*, 381.)

It is said, however, that the Territorial Legislature of Kansas passed an Act on the 11th of February, 1859, as follows:

"All laws of the Territorial Legislature passed previous to the first day of January, A. D. 1857, are hereby repealed."

It is intimated that by the passage of this Act the charter of the Leavenworth, Pawnee and Western Railroad Company was absolutely repealed. This being rather a delicate question, the intimation is more covert than open.

The position could not well be broadly taken that this last named Act repealed the original charter of 1855, because such position would put an end to the defense now sought to be interposed.

It is not in consonance with the usual modes of procedure in reference to corporations, to destroy them by a sweeping repealing Act. The usual mode of procedure is by a special Act, directed specifically to the charter which it is intended to repeal, or else by judicial proceedings, in which the defendant would have an opportunity to be heard.

This rule is so well settled that the Court said in *Lessee* v. *Frostburg* (24 *How.*, 278):

"The Courts are bound to regard the defendant as a corporation, until it is dissolved by judicial proceedings on behalf of the government that created it."

If the repealing Act of February 11th, 1859, did repeal the charter of the Leavenworth, Pawnee and Western Railroad Company, then the defendant has no corporate organization in the State of Kansas under any law, and is guilty of usurpation pure and simple.

But this repealing Act upon its face repeals only those Territorial laws, which were passed previously to January 1st, 1857. The supplement to the charter, which was passed on the 23d of January, 1857, is not affected by the repeal. Such supplement continued, and kept alive, and extended all the provisions of the original charter, as fully as if they had been re-enacted specifically therein. Moreover, the original charter is revived and continued in force by the Acts of the State of Kansas of 1861 and 1862, to which reference has already been made.

It results, therefore, that neither by the repealing Act, nor by the change of name, has the organic structure or the individuality of the Leavenworth, Pawnee and Western Railroad Company been terminated, modified or changed.

The Financial Acts of the Kansas Pacific Railway Company and its Predecessors in Name, Founded upon its Territorial and State Charter.

On the 1st of August, 1865, a thirty years' mortgage was made and duly recorded, which stated as follows:

"This Indenture between the Union Pacific Railway Company, Eastern Division, a corporation created under the laws of Kansas, &c., witnesseth: That whereas, the Union Pacific Railway Company, Eastern Division, pursuant to the terms of their charter granted by the Governor and Legislative Assembly of the Territory of Kansas, in the United States of America, incorporating them, the amendments thereto by the State of Kansas, and the act of Congress approved July 1, 1862, and the several acts of Congress amendatory thereof, are engaged in constructing a railroad from the Missouri River, at the mouth of the Kansas River, on the south side thereof, and from Wyandotte, in the State of Kansas, to Fort Riley, in said State, and thence westwardly,

and for the purpose of constructing one hundred and forty miles of the same, have resolved to raise money by loan not exceeding $2,240,000, to be a first lien, and have executed 2,240 bonds of $1,000 each, being at the rate of $16,000 per mile, for which amount these bonds have priority, and the lien of the Government bonds is subordinate to them, * * * have granted, bargained, sold, &c., all the said railroad line, including one hundred and forty miles of railroad, with the road bed and all rights thereon, tolls and income, and all the franchises, rights and privileges," &c.

On the 1st of January, 1866, a thirty years' mortgage for $600,000 was made, which recited as follows:

"This indenture, made this first day of January, 1866, between the Union Pacific Railway Company, Eastern Division, a corporation created under the laws of Kansas," &c.

This provided for bonds to the amount of $600,000 to complete a branch from Leavenworth, in Kansas, to the junction with the main line east of Lawrence, but excluded, as did the former mortgage, lands granted by Congress, save so far as the road-bed, depot grounds, &c., were concerned.

On the 1st of March, 1866, a five and ten year mortgage for $500,000 was made on the lands granted by Congress between the 140th and 240th mile posts west from the Missouri River, which recited as follows:

"This Indenture made this first day of March, 1866, between the Union Pacific Railway Company, Eastern Division, a corporation created under the laws of the State of Kansas, and, &c."

On the 1st of June, 1866, a thirty year mortgage for $4,063,000 was made on the road-bed and franchises to secure bonds for $1,000 each, numbered from 2,241, at the rate of $16,000 per mile, to continue the extension of the railway from the 140th mile post to the point west of the 100th meridian, to which Government aid extended, and which recited and contained as follows:

"This Indenture, made this first day of June, 1866, between the Union Pacific Railway Company, Eastern Division, a corporation created under the laws of Kansas, and, &c., witnesseth: That whereas, the Union Pacific Railway Company, Eastern Division, pursuant to the terms of their charter granted by the Governor and Legislative Assembly of the Territory of Kansas,

in the United States of America incorporating them, the amendments thereto by the State of Kansas, and the Act of Congress approved July 1, 1862, and the several Acts of Congress amendatory thereof, did, on the 1st of August 1865, make a certain mortgage, &c. Now therefore, this Indenture witnesseth that the said Union Pacific Railway Company, Eastern Division, &c."

On the 1st of July 1866, a mortgage was made and duly recorded for $2,840,000 on the road-bed and franchises to aid in the construction of the railway from Wyandotte to the same point west of the 100th meridian, and the branch from Leavenworth to the main line, and such mortgage contained the same recital and provisions as those last above quoted.

On the 20th of June, 1869, a thirty years' mortgage was made for $6,500,000, on lands and franchises, which contained among other things the following:

"An Indenture, made the twentieth day of June, 1869, between the Kansas Pacific Railway Company, a corporation created by and existing under the laws of Kansas, and of several Acts of Congress, and, &c. Whereas, the party of the first part is a corporation, with full power and authority to execute this Indenture, and was originally created by an Act of the Legislature of the Territory of Kansas, under the title of the Leavenworth, Pawnee and Western Railroad Company, which title was, on the sixth day of June, 1863, at a regular meeting of the stockholders of said company, in pursuance of authority given by Act of the Legislature of the State of Kansas, duly changed to 'The Union Pacific Railway Company, Eastern Division,' and in pursuance of such authority, and likewise of an Act of Congress, such title was afterwards duly changed to 'The Kansas Pacific Railway Company'; and, whereas, the said company under and by virtue of the various Acts of the former Territory and present State of Kansas, and also of a certain Act of Congress of the United States, approved July 2, 1862 * * * * and, whereas, the said party of the first part, by virtue and in pursuance of said Act and of the Acts of the Territory and State of Kansas is authorized and empowered to borrow money to the amount of $32,000 per mile from the 394th mile post west from the Missouri River, * * * * and, whereas, the said party of the first part has constructed, and has in operation from the State line at the Kansas River on the south side, and from Wyandotte, with a branch from Leavenworth to its main line near Lawrence to the 405th mile-post, its completed and equipped line of railroad, * * * * and is now engaged in the construction of an extension of its said line of railroad from the present terminus thereof to Denver in Colorado, * * * * has granted, bargained, and sold those sections of land granted by Congress * * the railroad * * and all franchises."

On the 1st of July, 1870, the Kansas Pacific Railway Company made another mortgage in which the recitals

were the same as those last above quoted and which mortgaged the alternate sections.

On the 23d day of August, 1871, the Kansas Pacific Railway Company made another mortgage in which the recitals were the same as those last above quoted and which mortgaged the alternate sections.

On the 1st day of May, 1879, the Kansas Pacific Railway Company executed a mortgage which recited and granted as follows:

"This Indenture, made the first day of May, A.D. 1879, between the Kansas Pacific Railway Company, hereinafter called the said company, of the one part, and Jay Gould and Russell Sage, both of the City and State of New York, hereinafter called the said Trustees, of the other part: Whereas, said company is a railroad corporation created by an Act of the Legislature of the Territory of Kansas, passed in 1855, under the name of the Leavenworth, Pawnee and Western Railroad Company, which name has since been duly changed, first to 'The Union Pacific Railway Company, Eastern Division,' and again to 'The Kansas Pacific Railway Company.' And, whereas, said company, in pursuance of authority thereunto given by said recited act and other acts of the Legislatures of the present State and former Territory of Kansas, and of the State of Missouri, and of an act of Congress of the United States entitled, 'An Act to aid in the construction of a railroad and telegraph line from Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1st, 1862, and of a subsequent act amendatory thereof, approved July 2d, 1864: * Now, this Indenture witnesseth that said company, in consideration of the premises, and in order to secure the due and punctual payment of the principal and interest of said consolidated first mortgage bonds, issued and to be issued, doth by these presents grant, bargain, sell, convey, transfer and assign, and by these presents does grant, bargain, sell, convey, transfer and assign unto the said Jay Gould and Russell Sage, Trustees as aforesaid, and to their heirs, executors, administrators, assigns and lawful successors, as such Trustees, according to the respective nature and quality thereof, all the franchise of said company to maintain and operate such railway between the points aforesaid and to be a corporation, and all the estate and interest of said company in said premises, but subject, nevertheless, to all prior liens and mortgages affecting the same hereinbefore recited."

All these mortgages were acknowledged before a Commissioner for the State of Kansas, and were recorded as required by the Registry Acts of the State of Kansas. They were not acknowledged before a United States Commissioner, nor were they required or authorized to be recorded by any statute of the United States.

It was the last-named mortgage to Gould and Sage upon the tolls, revenues and franchise of the Kansas Pacific Company—now alleged to be no longer in existence—which was referred to in the 9th Article of Consolidation in these words:

"Nor shall anything herein contained affect or impair the right to issue all unissued bonds under the Kansas Pacific consolidated mortgage of date May 1, 1879, wherein Jay Gould and Russell Sage are trustees, but such unissued bonds may, notwithstanding this consolidation, be issued in the same manner and with the same effect in all respects as if these articles had not been adopted and executed."

This *resumé* shows in the most emphatic manner the identity of the Kansas Pacific with the Leavenworth, Pawnee and Western Railroad Company, and that the statutes of the State of Kansas were relied upon and utilized to procure the money to build the road. The mortgages of the franchise—the acknowledgment and recording of the mortgages were all authorized by the State of Kansas, and not by the United States.

Again, the answer asserts that the consolidation relied upon was approved by 199,084 shares out of 200,000. These shares are alleged in the articles to be only $50 each. No act of Congress gave a right to issue these shares or prescribed their value. The original charter and supplement did both. The charter said:

"the capital stock of which shall be five millions of dollars to be divided into shares of fifty dollars each."

The supplement* said:

"And for such purpose the said company may increase their capital stock to ten millions of dollars, or any other amount necessary for the completion of the said road."

After these repeated acts of user of the chartered powers and privileges—and upon the faith of which third persons have acted and parted with their money—it is somewhat late to assert that the Leavenworth, Pawnee and Western Railroad Company "had a paper existence only" or that its charter was "repealed." The defendant is estopped from occupying that position.

* See Appendix.

The Reports of the Kansas Pacific.

On the 2nd of April, 1869, the Kansas Pacific made its second Annual Report to its stockholders for the year 1868, which commenced in these words:

"In accordance with the requirements of the charter the Board of Directors submit * * * * In order to ascertain the point to which Government aid in bonds to this company should extend, the Interior Department directed two surveys to be made from Fort Riley to the Union Pacific Railroad, at the 100th meridian. The department adopted the shorter of these surveyed lines against the expressed conviction of your Board, and ordered it to be adopted as the measurement of the distance for which this company should be entitled to bonds from the United States. Under protest on this measurement, bonds were finally accepted to a point 393.1 miles west from the Missouri River. This decision of the Interior Department leaves 11.1 miles of constructed road for which the company has yet received no bonds from the Government, and on which there is at present no lien or encumbrance whatever. By an Act of Congress approved July 3, 1866, this company was authorized and required to connect their road with the Union Pacific Railroad at a point not more than fifty miles westwardly from the meridian of Denver. * * * * As the company did not desire to construct that portion of the line between Denver and the connection with the Union Pacific Railroad, about 106 miles in length, the Denver Pacific Railroad and Telegraph Company, a corporation organized under the laws of Colorado, applied to Congress for the right of way and a land grant to make that connection. It was agreed by the two companies that another Act of Congress should be sought, authorizing a contract between them for the construction, operation and maintenance, by the Denver Pacific Company, of the said part of our line, and for the transfer of the land grant thereupon. This act was passed and approved the 3d of March, 1869. It fixed the point of connection with the Union Pacific Railroad at Cheyenne, and required that all the provisions of the law for the operation of the Union Pacific Railroad, its branches and connections as a continuous line, without discrimination, should apply the same as if the road from Denver to Cheyenne had been constructed by the Union Pacific Railway Company, Eastern Division. This confirmed and secured most valuable privileges, by which the line of this company from Kansas City via Denver and Cheyenne, is placed on the same footing as the road between Omaha and Cheyenne. * * * * The contract, authorized by law, with the Denver Pacific Company, has been fully executed."

On the 1st of April, 170, the Kansas Pacific made its third Annual Report to its stockholders, for the year 1869, in which it was said:

"It will be observed that the business of the road has been almost entirely of a local character, and a very large proportion of it has been confined to the first two hundred miles of the line west of Kansas City. * * * * At the date

of your last Annual Meeting the western terminus of the road was at Sheridan, 405 miles from the State line of Missouri, and 11 1/16 miles beyond the point to which bonded aid from the Government extended. This terminus at Sheridan was unsatisfactory and failed to give the company command of that portion of Colorado trade which geographically should come to its lines. There was a gap of about 232 miles between Sheridan and Denver which it was essential to the complete success of this enterprise should be filled up at as early a date as practicable. * * * * At this date the track is laid and the road in operation to Kit Carson, 82 miles west of Sheridan. The grading is all under contract, and the iron and other material ordered for delivery within the next three months for the remaining 150 miles between Kit Carson and Denver; and it is expected to have the whole road finished and in operation by September next. The Denver & Pacific Railway Company, with whom the contract was made in accordance with the Act of Congress of March 3, 1869, for the construction of that portion of the road between Denver and Cheyenne, 106 miles, have already laid 58 miles of track, and the remaining 48 miles will be finished, and the road in operation by June 30th, next. The interest of this company dictated the acquiescence of your Board in the passage of the Act of March 3d, 1869, and in the execution of the contract therein provided. * * * * As a further protection against a ruinous competition in business, a contract was entered into between the two companies to divide equally the gross earnings of 212 miles of the road nearest to Denver."

On the 1st of May, 1871, the Kansas Pacific made its fourth Annual Report to its stockholders, for the year 1870, in which it was stated as follows:

"The business of the company, since the completion of the road to Denver, has fully equalled our expectations, and a new impetus has been given to immigration to Colorado. The railroad now owned and controlled by this company consists of

Main Line, Kansas City to Denver	638.6 miles.
Branch, Lawrence to Leavenworth	34. "
Total miles of Kansas Pacific Railway	672.6 "

On the 30th of April, 1872, the Kansas Pacific submitted its fifth Annual Report to its stockholders, for the year 1871, in which it was stated as follows:

"The arrangement heretofore existing with the Denver Pacific Railway Company not having proved satisfactory to your interest, a change has been effected in the direction and management of that company which we believe will hereafter inure to your material advantage. Your company is now the absolute owner of three-fourths of the stock of the Denver Pacific Railway and Telegraph company, and have entire control of this organization, and of the leased lines to the Boulder Coal Fields. The action of the Union Pacific Railroad Company in establishing excessive and prohibitory rates between Cheyenne and Ogden, on all business to and from your road, in direct viola-

tion of the Act of Congress, has been a source of serious injury to this company; and since the completion of the road to, and the connection with the Union Pacific, as contemplated by law, these illegal rates have virtually excluded your lines from any share of the business of the country west of Cheyenne. The revenues of your company have been materially affected by this action, and every effort has been made to secure an amicable adjustment with that company, but without success. Your Board have therefore appealed to Congress and the courts to secure this company in its rights under the law."

On the 30th of April, 1873, the Kansas Pacific made its sixth Annual Report to its stockholders, for the year 1872, in which it was stated, among other things, as follows:

"The advantages secured to your company through the control of the Denver Pacific Railway, have proven as great as was anticipated at the time of its transfer to you; and when it shall be operated as directed by the Act of Congress, as a connected continuous line, as a link in the chain of Pacific Railroads between your road and the Union Pacific, it will become a paying line. It is to be regretted that no satisfactory arrangement has yet been made with the Union Pacific, by which the intention of Congress can be carried out."

These reports disclose the reason for the passage of the Act of Congress of March 3, 1869, authorizing the transfer from the Union Pacific, Eastern Division, to the Denver Pacific of the lands and right of way of the former, and also show that by the contemporaneous interpretation of the Act by the parties the only lawful way by which the Union Pacific, Eastern Division, could control the Denver Pacific was to acquire as "absolute owner three-fourths of the stock" of that company, and thus "have entire control of the organization."

These reports are competent evidence against those who prepared as well as those who received them, as they constitute in law a portion of the records of the company. (*Farwell* v. *Houghton*, 8 *Fed. Rep.*, 66.)

The Minutes of the Directors of the Kansas Pacific Railway Company.

"Office of the Kansas Pacific Railway Company. Lawrence, Kansas, January 5th, 1871.

Internal Revenue Stamp. 5 cents. Cancelled.

At a meeting of the Board of Directors of the Kansas Pacific Railway Company, held at the office of the company in the City of Lawrence, on the fifth day of January, 1871. Present: a quorum of said Board.

Among other proceedings the following was had, viz.:—It was moved by Rob't E. Carr, and seconded by Adolphus Meier, that sections 14, 19, 23 and 25 of Article 3, Chapter 23 of the General Statutes of the State of Kansas, A. D. 1868, being an act entitled: 'An Act concerning private corporations,' be accepted by the company, and made a part of its Charter. Whereupon the Board of Directors proceeded to vote upon said motion by 'ayes' and 'noes.' Those voting 'aye' were Adolphus Meier, Rob't E. Carr, Geo. D. Hale, B. W. Lewis, Jr., C. S. Greeley and John D. Perry. Those voting 'no' were none. And it appearing that all the members present had voted in the affirmative, it was unanimously resolved and declared that the aforesaid sections 14, 19, 23 and 25 of Article 3, Chapter 23 of the General Statutes of the State of Kansas, A. D. 1868, of the act entitled: 'An Act concerning private corporations,' be, and the same are hereby declared to be portions of the charter of this company pursuant to said section 25, and as therein provided, and that the Secretary of this company make and file with the Secretary of State of Kansas a certified copy of this action of the Board. (Seal of Kansas Pacific Railway Company.)

State of Kansas, } ss.:
County of Douglas, }

I, Charles B. Lamborn, Secretary of the Kansas Pacific Railway Company, do hereby certify that on the fifth day of January, 1871, at a meeting of the Board of Directors of said company, held at the office of the company in the City of Lawrence, the foregoing declaration and resolution was adopted by said Board, and duly recorded in the minutes of the Board of Directors, and that in pursuance thereof this certificate is made. In witness whereof, I hereunto set my hand, and affix the seal of the company. Charles B. Lamborn, Secretary K. P. R. W. Co.

State of Kansas, } ss.:
Douglas County, }

Charles B. Lamborn, being duly sworn, deposeth and saith that he is the Secretary of the Kansas Pacific Railway Company, that the foregoing paper, purporting to be a declaration of the Board of Directors, is a genuine copy from the minutes of said Board, and that his certificate with the seal of the company thereto attached is also genuine, and made for the purpose in said certificate indicated. And further saith not. S. J. Gilmore, Notary Public, Jan. 5, 1871. (Seal.) (Internal Revenue Stamp. 5 cents. Cancelled.) Filed January 5, 1871, at 6.45 P. M., in office of Secretary of State of the State of Kansas."

The provisions of Sections 14, 19, 23 and 25 of the Act of Kansas of 1868 (*Comp. Laws, p.* 215) thus referred to are as follows:

"SEC. 14. Any corporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital, by a vote of the stockholders, in conformity with the by-laws thereof; and if a majority of the stockholders shall vote for the increase of stock, the same may be increased by the board of directors, trustees, or other business managers of such corporation; and upon such increase of stock being made in accordance with the by-laws, the date and amount of such increase shall be certified to the Secretary of State by the directors or trustees, and from the time such certificate is filed, the increase of stock shall become a part of the capital thereof. Such certificates shall be filed and recorded in the same manner as the charter.

SEC. 19. The directors or trustees may adopt by-laws for the government of the corporation, but such by-laws may be altered, changed, or amended by a vote of the stockholders, at an election to be ordered for that purpose by the directors or trustees, on the written application of a majority of the stockholders or members.

SEC. 23. The directors or trustees shall have the general management of the affairs of the corporation, and may dispose of the residue of the capital stock at any time remaining unsubscribed, in such manner as the by-laws may prescribe. They shall cause a record to be kept of all stock subscribed and transferred, and of all business transactions, and their books and records shall at all reasonable times be open to the inspection of any and every stockholder. They shall also, when required by one-third of the stockholders thereof, present reports in writing of the situation and amount of business of the corporation, and declare and make such dividends of the profits from the business of the corporation as they shall deem expedient, or as the by-laws may prescribe.

SEC. 25. Any corporation heretofore organized, and now in existence, under any general or special law of the Territory or the State of Kansas, may, by a vote of its board of directors, accept any or all the provisions of this act, and have and exercise all the rights, powers and privileges conferred by this act, by filing a copy of their acceptance with the Secretary of State, whereupon that portion of their charter inconsistent with this act, or the portion accepted, shall cease to be applicable to such corporation; and they shall have the exclusive right to carry out the objects of said corporation, as described in their act of incorporation or certificate filed with the Secretary of State, if acting under a general law within the limits and boundaries described in said act of incorporation or certificate, as the case may be, without any limitation as to time, and shall possess all the privileges and franchises conferred by their act of incorporation or certificate filed with the Secretary of State, not abandoned in the copy of acceptance of any or all the provisions of this act."

"Office of the Kansas Pacific Railway Company, Lawrence, Kansas, January 5th, 1871, 8 o'clock, P. M.

"At an adjourned meeting of the Board of Directors of the Kansas Pacific Railway Company, held at the office of the company in the City of Lawrence, on the 5th day of January, 1871,—Present: a quorum of said Board. Among other proceedings the following was had, viz.: In accordance with the by-laws of this company and its charter and the laws of the State, and in conformity with the direction of the stockholders, now reported to the Board, wherein the stockholders have resolved that the capital stock of this company shall be increased to, and be ten million ($10,000,000) of dollars, on motion it was unanimously resolved and declared 'that the capital stock of this com-

pany be increased to, and be ten millions of dollars ($10,000,000).' This is to certify that the foregoing resolve and declaration increasing the capital stock of the Kansas Pacific Railway Company, was made in accordance with the by-laws and direction of the stockholders of said company, that the capital stock of said Kansas Pacific Railway Company, by virtue of the direction and authority aforesaid, was, at a meeting of the Board of Directors, at the office of the company in the City of Lawrence, on the 5th day of January, 1871, increased and declared to be ten millions of dollars ($10,000,000), and the same is now hereby declared to be ten millions of dollars ($10,000,000), all which we send certified under our hands, Directors in said company, this the fifth day of January, 1871, with the request that the same be filed in the office of the Secretary of State. John D. Perry, Adolphus Meier, Rob't. E. Carr, B. W. Lewis, Jr., Geo. D. Hall, C. S. Greeley. Attest: Chas. B. Lamborn, Secretary. Filed January 7th, 1871, in the office of the Secretary of State of the State of Kansas."

These minutes show that the Kansas Pacific Company availed itself in 1871—nine and seven years after the alleged consolidating acts of Congress of 1862 and 1864—of the statutes of Kansas, for the purpose of increasing its capital stock, if that were necessary, and of adopting by-laws; and of empowering its directors to dispose of the increased stock; and also asserted in that year that it was a corporation having an existing and not a repealed charter of the Territory and State, and as such, therefore, authorized to accept the designated sections of the State Act of 1878.

THE ACTS OF CONGRESS RELATING TO THE LEAVENWORTH, PAWNEE AND WESTERN RAILROAD, UNDER ITS VARIOUS NAMES.

The Act of July 1, 1862, incorporating the Union Pacific Railroad Company, gave it power of perpetual succession, of suing and being sued, of constructing railways, of issuing capital stock, conferred upon it a right of way through public lands, gave it every alternate section of land, and provided for the issuance to it by the Secretary of the Treasury of United States Bonds, which were to constitute a first mortgage on the road. The road was authorized to connect at the western boundary of Nevada with the line

of the Central Pacific Railroad Company to California. The ninth, tenth, twelfth and thirteenth sections of this Act provided as follows:

"*Section IX.*—And be it further enacted: That the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the 100th meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions, in all respects, as are provided in this Act for the construction of the railroad and telegraph line first mentioned [the Union Pacific] and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri River to the Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas Railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas Road shall be made so as to conform thereto; and the said railroad through Kansas shall be so located between the mouth of the Kansas River, as aforesaid, and the aforesaid point on the 100th meridian of longitude, that the several railroads from Missouri and Iowa herein authorized to connect with the same, can make connection within the limits prescribed in this Act, provided the same can be done without deviating from the general direction of the whole line to the Pacific Coast. The route in Kansas west of the meridian of Fort Riley to the aforesaid point on the 100th meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey; and said Kansas Company may proceed to build said railroad to the aforesaid point on the 100th meridian. * * * * Said company shall file their acceptance of the conditions of this Act, in the Department of the Interior within six months after the passage of this Act. * * * * *Section X.*—The said company, chartered by the State of Kansas, shall complete one hundred miles of their said road, commencing at the mouth of the Kansas River as aforesaid, within two years after filing their assent to the conditions of this Act as herein provided, and one hundred miles per year thereafter until the whole is completed. * * * * *Section XII.*—And the companies herein named in * * * Kansas * * * filing their assent to the provisions of this Act, shall receive and transport all iron rails, chairs, spikes, etc. * * * *Section XIII.*—And the Leavenworth, Pawnee and Western Railroad Company of Kansas may construct their railroad from Leavenworth to unite with the road through Kansas."

The Act of July 2, 1864, provided as follows:

"*Section X.*—And be it further enacted: That Section V. of said Act [of July 1, 1862], be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this Act and the Act to which this Act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines, to an amount not

exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively; and the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments. * * *Section XII.*—And be it further enacted: That the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, shall build the railroad from the mouth of the Kansas River, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years build a railroad from the City of Leavenworth to unite with the main stem at or near the City of Lawrence; but to aid in the construction of said branch, the said company shall not be entitled to any bonds; and if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories, when the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, shall have completed their road to the 100th degree of longitude, then the last named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company, on the same line. And the said railroad from the mouth of the Kansas River to the 100th meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas River, opposite said towns."

The Act of March 3d, 1869, provided as follows:

"That the Union Pacific Railway Company, Eastern Division, be, and it hereby is authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the roadbed already graded by the said Denver Pacific Railway and Telegraph Company, as said line; and to grant to said Denver and Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line. * * * * That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the City of Denver, so as to form, with that part of its line herein authorized to be constructed, operated and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railway and telegraph from Kansas City, by way of Denver to Cheyenne; and all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by said Union Pacific Railroad Company, Eastern Division; but nothing herein shall authorize the said Eastern Division Company to operate the road, or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company. * * * * That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall

receive patents to the alternate sections of land along their respective lines of road as herein defined, in like manner, and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division, provided that neither of the companies shall be entitled to subsidy in United States bonds under the provisions of this Act."

It is to be observed here that the Act of 1864 does not authorize any mortgage upon the franchise, whether acquired from Federal or State Government.

It is suggested on the answer that the recipients of the bounty conferred by these two Acts were "the persons composing the Leavenworth, Pawnee and Western Railroad Company," and that such "persons" thereby "became a corporation of the United States with the same name." The suggestion ceases to be of force when the facts are recalled, first, that Congress did not designate these "persons" by name or otherwise, and secondly, that Congress did not purport by either of the acts referred to to create, constitute or form any other corporation than "The Union Pacific Railroad Company." It did incorporate that company by apt and customary words and with that its act of incorporating ceased.

Acts of Kansas in Relation to the Consolidation of Railroad Companies.

In 1862, the State of Kansas passed an Act which, so far as is pertinent to the question under consideration, was in these words:

"Any railroad company, now organized, or which shall hereafter organize under the laws of Kansas may, at any meeting, regularly called, of all the stockholders thereof, by a vote of persons holding a majority of the stock of said company, unite or consolidate it with any other company or companies now organized, or which may be hereafter organized, under the laws of the United States, or of any State or Territory, by the consent of the company with which it may so consolidate and unite; and such company or companies with which it shall so unite or consolidate, may hold, use and enjoy all the rights and privileges conferred by the laws of Kansas on the company or companies so uniting or consolidating with it, and shall be liable for all the debts, and own all the property and franchises of such company or companies.

In 1865, Kansas passed another Act, the XXII section of which was as follows:

"Any railroad company in this State forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation, in the manner following: *First.*—Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the names and places of residence, and number of directors thereof, which shall not exceed nineteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, which shall be not less than one hundred dollars, the manner of converting shares of capital stock in each of said two or more corporations into shares in said new corporation, the manner of compensating stockholders in each of said two or more corporations who refuse to convert their stock into the stock of such new corporation; with such other details as they shall deem necessary to perfect such consolidation of said corporations. And such new corporation shall possess all the power, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisons of this Act."

The Act of 1862, was entitled "An Act relating to railroad companies," and gave general powers, in all regards, to such companies.

The Act of 1865 was entitled "An Act to provide for the incorporation and regulation of railroad companies."

On the 31st of October, 1868, the State of Kansas passed an Act concerning its general statutes, in which it was, among other things, provided that:

"The following Acts of the Legislature shall constitute the General Statutes of the State of Kansas, viz.:

All Acts revised by the Commissioners appointed to revise the General Statutes of this State, and reported to and enacted by the Legislature at its present session.

All other Acts of a general nature enacted at the present session; and the following named Acts, or so much and such part thereof as may be and remain in force at the time of the passage of this Act, viz.:"

The Act of Kansas of 1862 relating to railroad companies, and the Act of Kansas of 1865, to provide for the incorporation and regulation of railroad companies, were not contained among the acts enumerated in the Act of October

31, 1868; nor were either of such Acts of 1862 and 1865 revised by the Commissioners and reported to and enacted by the Legislature at the session held in October, 1868. Those two Acts, therefore, of 1862 and 1865, became obsolete, and thereafter, and until the 12th of May, 1870, there remained no statutory provisions in the laws of Kansas authorizing the consolidation of railroads.

On the first of March, 1870, the State passed an Act, which took effect May 12th, 1870, in these words:

"Any two or more railroad companies in this State, existing under general or special laws, and owning railroads constructed wholly, or in part, which when completed and connected will form a continuous line or lines of railroad, and any railroad company organized as aforesaid, and any railroad company duly organized and existing under the laws of an adjoining State whose lines of railroad shall connect at the State line, so as to form one complete and continuous line of railroad, are hereby authorized to consolidate and form one company owning and controlling such continuous line or lines of railroad, with all the powers, rights, privileges, and immunities, and subject to all the obligations and liabilities to the State which belonged to or vested [rested] upon either of the companies making such consolidation."

This is the only law of the State of Kansas now in force authorizing the consolidation of railways.

There are three special features of this Act of 1870, which are to be observed:

1. That it authorizes the consolidation with those roads only which existed under the general or special laws of the State of Kansas, or which are organized and exist under the laws of an adjoining State.

2. That consolidation with railways organized and existing under the laws of adjoining States is authorized only when the lines of such railroad shall connect at the State line of Kansas with one of the State railways so as to form a complete and continuous line of railroad.

3. That such consolidation is expressly subject to all the obligations and liabilities to the State.

THE DIRECTORY ACTS OF THE STATE OF KANSAS IN RELATION TO RAILROADS, WHICH WERE IN FORCE ON THE 24TH DAY OF JANUARY, 1880, WHEN THE CONSOLIDATION IN QUESTION PURPORTS TO HAVE BEEN MADE, OR WERE SUBSEQUENTLY PASSED.

The laws of Kansas divide the cities of that State into three classes according to population, *i. e.*, 15,000 and over, which are called first class, 2,000 to 15,000 which are called second class, and those of less than 2,000, which are called third class; and the municipal authorities of each of these classes are given power to make certain regulations concerning the management of railways within said cities.

The Acts are similar, and one illustration may suffice. The powers conferred upon the authorities of a city of the first class are as follows:

"*Twentieth.*—To regulate levees, depots, depot grounds, and places for storing freight and goods, and to provide for the construction and passage of railways through the streets and public grounds of the city: Provided, that no person or company, to whom the right and privilege shall at any time be granted by the mayor and council of said city to construct railroads through the streets of such city, shall have the exclusive privilege to use any of the streets for that purpose, except those streets through which they may actually construct and operate their railway tracks.

Twenty-first.—To regulate the crossings of railway tracks and to provide precautions and prescribe rules regulating the same, and to regulate the running of railway engines, cars and trucks within the limits of said city, and to prescribe rules relating thereto, and govern the speed thereof, and to make any other and further provisions, rules and restrictions to prevent accidents at crossings and on the tracks of railways, and to prevent fires from engines; and where such city shall, prior to the passage of this act, have made a contract with any railroad company, or passed an ordinance permitting said railroad company to construct a railroad track across levees or public grounds of said city, and to construct a depot on said levee or public grounds, or extend the time for the completion of said depot, said contract and ordinances are hereby declared to be in full force, and legal, valid and binding upon all parties." (*Chap.* 18, § 13, *Sub.-div.* 20, 21. *Comp. Laws, p.* 142.)

The laws of Kansas in relation to the powers and duties of corporations have been hereinbefore quoted so far as Sections 14, 19, 23 and 25 of Chapter 23 are concerned.

Further sections of Chapter 23, which have relation to railroads, are as follows:

"SEC. 3. Private corporations are of three kinds * * corporations for profit.

SEC. 5. The purposes for which private corporations may be formed are * * Subd. 15. The construction and maintenance of a railway.

SEC. 24. It shall be the duty of the president and secretary of such corporation for profit, annually, on the first day of January, to prepare, under their oaths, and deposit in the office of the Secretary of State of this State, a detailed statement of the condition of such company on the thirtieth day of December, then next preceding, exhibiting the following, namely: *First.*—The amount of the capital stock of the company. *Second.*—The property or assets held by the company. *Third.*—The liabilities of such company. *Fourth.*—The receipts of the company during the preceding year. *Fifth.*—The expenditures during the preceding year. Every corporation, for profit, created under any law of this State, failing to make and deposit such statement, shall be subject to a penalty of two hundred dollars and an additional two hundred dollars for every month that such company shall continue thereafter to transact business.

SEC. 31. If the directors of any corporation shall knowingly declare and pay any dividend when the corporation is insolvent, or any dividend, the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be thereafter contracted as long as they shall respectively continue in office. The amount for which they shall all be so liable shall not exceed the amount of such dividend; and if any of the directors shall be absent, at the time of making the dividend, or shall object thereto at the time such dividend is declared, and shall file their objection in writing, with the secretary or other officer of the corporation, having charge of the books, they shall be exempted from the said liability.

SEC. 31*a*. Every corporation, created by or existing under the laws of this State, shall have and keep a general office for the transaction of business, and shall keep such office within this State, and shall have at least three of its directors citizens and residents of this State; and in case such corporation is a railroad or railway company, it shall have such general office located on or near the main line of its road or route mentioned in its charter. At such general office shall be kept the records and books of the corporation, and also the office of the superintendent, general manager or director, secretary, auditor, treasurer and paymaster, general freight agent, and general ticket agent, under whatever name the duties usually pertaining to such offices may be transacted, together with all the books of accounts appertaining to the business of such offices.

SEC. 31*b*. Any corporation failing or refusing to obey any of the provisions of the first section (*Section* 31*a*, *of this chapter*) of this act for the period of six months, shall be deemed to have forfeited its charter, and such forfeiture may be decreed by any district Court of any county in which such corporation may do business, or into which any line of such railroad or railway may extend, in an action to be instituted for that purpose, in the name of the State of Kansas, by the county attorney of the county in which such action is prosecuted." (*Chap.* 23, *Comp. Laws*, *p.* 219.)

The especial statutes of the State relating to railway corporations took effect on the 31st of October, 1868, and are as follows:

"SEC. 47.—Every railway corporation shall, in addition to the powers hereinbefore conferred, have power—

First.—To cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers, agents or servants, to enter upon the lands or water of any person, but subject to liability for all damages which may be done thereto.

Second.—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railway; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only, and to purchase and hold, with power to convey, real estate, for the purpose of aiding in the construction, maintenance and accommodation of its railway.

Third.—To lay out its road not exceeding one hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor, as provided in this act for lands taken for the use of the corporation.

Fourth.—To construct its road across, along or upon any stream of water, water-course, street, highway, plank road or turnpike which the route of its road shall intersect or touch; but the company shall restore the stream, water-course, street, highway, plank road or turnpike, thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city.

Fifth.—To cross, intersect, join and unite its railway with any other railway at any point in its route, and upon the grounds of such other railway corporation, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connections; and every railway which is or may hereafter be intersected by any new railway, may unite with the owners of such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by three commissioners, to be appointed by the District Court of the county in which such crossing or connection is proposed to be made.

Sixth.—To take and convey persons and property on their railway by the power of steam or of animals, or by any mechanical power, and to receive compensation therefor.

Seventh.—To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery, for the accommodation and use of their passengers, freights and business.

Eighth.—To regulate the time and manner in which the passengers and prop-

erty shall be transported, and the compensation to be paid therefor; said compensation not to exceed the rates fixed by law.

Ninth.—From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railway, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the corporation for the purpose aforesaid.

SEC. 48. Every railway corporation, before constructing any part of their road into or through any county named in their charter, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the county clerk of the county into or through which the road is to be made.

SEC. 49. The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or donated to the corporation.

SEC. 50. The directors of any railway corporation may, by a vote of two-thirds of their whole number, at any time change the road-bed or road line, or any part thereof, for the purpose of shortening the line or to overcome natural obstacles; but such corporation shall not change the general route or terminus of the road.

SEC. 55. Every railway corporation in this State which now is, or may hereafter be, engaged in the transportation of passengers or property, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodation for the transportation of all such passengers, baggage, mails and express freight as shall within a reasonable time previous thereto be offered for transportation at the place of starting, at the junction of other roads, and at the several stopping places, and they are hereby required to stop all trains carrying passengers, at the junction or intersection of other railways, a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight, from the trains of railways so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting and intersecting roads whenever the same shall be delivered to them.

SEC. 62. All penalties imposed upon railway corporations by this or any other act may be sued for in the name of the State of Kansas, and if such penalty be for a sum not exceeding three hundred dollars, then such suit may be brought before a justice of the peace of the county in which the penalty accrued, and may be commenced by serving a summons on any officer or agent of such company found within the State.

SEC. 63. Any action, prosecution, or proceeding against a railway corporation, for any liability, penalty or forfeiture, may be brought in any county into or through which such railway runs, and the summons or other process, in any such case, may be directed to, and served by any officer of any county in which the principal office of such corporation may be, or in which any officer, director or agent of the corporation may be found.

SEC. 64. All existing railway corporations within this State, and such as may hereafter be created or formed, shall respectively have and possess all the powers and privileges contained in this article; and they shall be subject to all

the duties, liabilities and provisions contained in this article, not inconsistent with the provisions of any charter granted by the legislative assembly of the Territory of Kansas." (*Chap.* 23, *Comp. Laws, p.* 223, *&c.*)

The statutes of the State in relation to actions against corporations, after excluding those for the recovery, partition and sale of real property, contain the following:

"SEC. 49. An action, other than one of those mentioned in the first three sections of this article, against a corporation created by the laws of this State, or of the Territory of Kansas, may be brought in the county in which it is situated, or has its principal office or place of business, or in which any of the principal officers thereof may reside, or may be summoned; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose.

SEC. 50. An action against a railroad company or an owner of a line of mail stages or other coaches, for any injury to persons or property upon the road or line, or upon a liability as a carrier, may be brought in any county through or unto which said road or line passes.

SEC. 68*a*. Every railroad company or corporation, and every stage company doing business in the State of Kansas, or having agents doing business therein for such corporation or company, is hereby required to designate some person residing in each county, into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any Court of record or justices of the peace of such county may be served.

SEC. 68*c*. In every case such railroad company or corporation, and stage company, shall file a certificate of the appointment and designation of such person, in the office of the clerk of the District Court of the county in which such person resides; and the service of any process upon the person so designated in any civil action shall be deemed and held to be as effectual and complete as if service of such process were made upon the President or other chief officer of such corporation or stage company. Any railroad company, [or ?] corporation or stage company may revoke the appointment and designation of such person upon whom process may be served, as hereinbefore provided, by appointing any other person qualified as above specified and filing a certificate of such appointment as aforesaid; but every second or subsequent appointment shall also designate the person whose place is filled by such appointment." (*Chap.* 80, *Comp. Laws, pp.* 607, 609.)

The statutes of the State, passed subsequently to the general statutes, provided (*Comp. Laws, pp.* 784, 785 *and* 786) for the liability of railroad companies for damage done to personal property by negligence, giving the right of suit therefor against the company in the county in which such liability arose, and required bonds to protect laborers, to

have cattle-guards at crossings, and for the collection of damages when townships are injured by railway crossings.

The statutes of the State also provide (*Comp. Laws, p.* 943) for the assessment of railroads, and the property of railroad corporations, and for a sworn statement or schedule, containing full particulars as to the length of track, and location, material and value of depots, station houses, machine shops or other buildings, and all platforms, fuel and water stations, machinery and tanks, ties in track, weight of rails per yard, the joints or chairs used, ballasting, length of time iron has been used, length of time the road has been built, and of the rolling stock, and of the shares of capital stock authorized and paid up, and of its market value; and provides a penalty for a failure to make such return. It then requires the railroad assessors to make a just and equitable assessment on such return, but the same is not to be held conclusive. The return of the assessors is to be made through the Auditor of the State to county clerks, who are to certify the amount of such assessment to the proper officer of the different school districts, to the end that it may be placed on the tax roll.

The Act of March 6th, 1883, regulates the rates for transportation, constitutes a board of railroad commissioners and gives them power to have supervision over all railroads in the State operated by steam, and to enquire into any neglect or violation of the laws of the State by such companies, and with power to redress grievances, and prescribes generally the duties of railroad companies with reference to the transportation of persons and property, and the penalties for non-compliance with the terms of the Act and the manner of the collection of the same.

The Kansas Pacific Company having sought, and unsuccessfully (*Thomson* v. *Kansas Pacific*, 9 *Wall.*, 579), to evade the statutes of the State in relation to taxation, now seeks to evade by its alleged consolidation all the other provisions of the laws above quoted, and especially those

which require it to make verified annual reports to the State; to keep a general office for the transaction of business within the State and located on the main line of its road; to have at least three of its directors citizens of said State; to keep at its general office within the State the records and books of the corporation; to keep at such general office within the State the office of the superintendent, general manager, director, secretary, auditor, treasurer, paymaster-general, freight agent, general ticket agent and all the books of account appertaining to the business of such offices; to give notice of the time of starting its trains; to run and stop the same as the law requires; to submit to the service of judicial process in the prescribed manner and within the designated jurisdictions; to give bonds and to conform to the laws of the State regulating rates.

The enactment of all these statutes was within the sovereignty of the State. It was the sole and only judge of the propriety thereof. The enforcement of the same is within its rightful power. The various provisions are intended for the public good, and are a justifiable exercise of the general power of the State, and of its police powers over those holding a public office and operating a public highway. None of the statutes relate to any matter of Federal cognizance, nor does the attempt to enforce them present any question "arising under the Constitution or laws of the United States." The entire controversy is of State and local origin, and that it should arise at all recalls the question lately asked in the *Westminster Review*: "In the United States do the railways rule the State or the State the railways?"

If the State may enforce its laws against the Kansas Pacific Company and compel it to pay the State taxes, as the Supreme Court has said that it may, it is difficult to perceive why it may not enforce the other provisions of its

laws as above recited and which are equally necessary for the welfare of the State. The enforcement of the tax law was sustained in 1869 in the Supreme Court, not because it involved a federal question originally cognizable in the Circuit Court, but because the suit was cognizable in such Court upon the ground of citizenship. The plaintiffs described themselves in the bill as stockholders and citizens of Pennsylvania, Ohio, Missouri and Indiana, and alleged that the Kansas Pacific was a corporation existing under the Constitution and laws of the State of Kansas, and that the other defendants Funk, Blood and Cox were citizens of Kansas and treasurers respectively of three of its counties, and as such were proceeding to collect the State tax from the railroad. That case, therefore, does not affirm that the question of the validity of a State tax upon the Kansas Pacific is a question of original Federal cognizance.

How is a Corporation Created?

A State is, in a juridical sense, a corporation. As such, it is the only corporation which is self-creating. It declares itself by virtue of its inherent sovereignty to be a body politic, and, after such declaration, it is admitted into the family of nations, or as one of the United States, as the case may be. When so admitted it becomes for all juridical purposes a corporation. Aside from this, there is no power or capacity lodged elsewhere, by the exercise of which a corporation can constitute itself.

In *McCulloch* v. *Maryland* (4 *Wheat.*, 409), the Court said:

"The power of creating a corporation is one appertaining to sovereignty. It is the means by which other objects are accomplished. The power is exercised for the purpose of protecting something else."

In *People* v. *Assessors* (6 *Hill*, 620), the Court said:

"A corporation aggregate is a collection of individuals, united in one body under such a grant of privileges as secures succession of members without

changing the identity of the body, and constitutes the members, for the time being, one artificial person or legal being, capable of transacting some kind of business like a natural person. Such an union can only be effected under a grant of privileges from the sovereign power of the State."

In *State* vs. *Bradford* (32 *Vt.*, 53), the Court said:

"It is only the sovereign power of the State which can create corporate franchises."

That the Kansas Pacific Railway Company was created a corporation by the State of Kansas is proved by the charter and its supplement* granted by the State. Such Acts on their face created the railway company "a body corporate and politic," with "continual succession," and there were given to such body politic and corporate all the express and implied powers necessary to construct and operate a railway.

The Acts of Congress of July 1st, 1862, and July 2d, 1864, above quoted, do not, either in terms or by implication, attempt to create either the Leavenworth, Pawnee and Western Railroad Company, or the Union Pacific Railroad Company, Eastern division, a body politic or corporate, or to confer any corporate authority or power upon such company. On the contrary, those two Acts are limited to bestowing upon a previously existing corporation a right of way, alternate sections of land, and a right to Federal aid. These are grants of material aid, and by no means of incorporeal powers. No corporation is created—no franchise given—no power of any kind conferred—and no intent to give the same, or either thereof, is in any way manifested. On the contrary, the intent is plainly evident to recognize the corporation as created by the State of Kansas. The language:

"The Leavenworth, Pawnee and Western Railroad Company of Kansas * * and said Kansas Company * * the said company chartered by the State of Kansas * * the Leavenworth, Pawnee and Western Railroad Company of Kansas,"

* See Appendix.

is persuasive evidence that Congress recognized that company as having been chartered by the State of Kansas, and therefore, as being, as to the United States, a foreign corporation—and as having full capacity under such charter to become the recipients of the right of way, the alternate sections of land, and other pecuniary Federal aid, which it was the only intent of the Acts of 1862 and 1864 to bestow.

The language of those Acts repels the conclusion that Congress intended in and of itself to create a corporation. Had such been its intention, it would have used the phraseology to be found in the first section of the Act of July 1st, 1862, in which the persons therein named—

"are created and erected into a body corporate and politic in deed and law by the name, style and title of the Union Pacific Railroad Company."

The decisions of the Courts, both upon the general principle, and with reference to the charter of the Kansas Pacific Railway Company, are in harmony with this view.

Thus in *Central Railroad Co.* v. *Georgia* (92 *U. S.*, 670) the Court said:

"If in the statute there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication, and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute, every presumption is against it."

So also, in *Antelope Co.* v. *Chicago* (16 *Fed. Rep.*, 295) this Court said:

"The true rule is that where a State does not assume by its legislation to create a corporation but recognizes the existence of a foreign corporation and its right to come into the State and transact business therein, such foreign corporation remains a corporation of the State under whose laws it was created."

Again. In *Adams* v. *Denver* (16 *Fed. Rep.*, 712) this Court said:

"The respondent was chartered by the Territory of Colorado, but an act of Congress was passed granting to it the right of way over the public domain. This Act of Congress does not purport to create a corporation but only to grant to an existing corporation certain rights. The respondent is not a common carrier by virtue of the Act of Congress but by virtue of its charter granted by the legislature of Colorado."

In *Railroad Co.* v. *Harris* (12 *Wall.*, 80) it appeared that the Baltimore and Ohio Railroad Company was incorporated by the State of Maryland, and the same rights and privileges were granted to it in Virginia by statute of that State. Subsequently Congress authorized an extension of the road into the District of Columbia. The Court said:

"The counsel admitted that the Acts of Congress were only enabling Acts, and that they did not create a new corporation, but they insisted that the Acts of Virginia were of a different character, and that they worked that result. As regards the point under consideration, we find no substantial difference. In both, the original Maryland Act is referred to. Neither, expressly or by implication, created a new corporation. The permission was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before."

In *Thompson* v. *Pacific Railroad Co.* (9 *Wall.*, 579) it is stated by the Reporter and by the Court:

"The Union Pacific Railway Company, Eastern Division, was originally incorporated in 1855, by the Legislature of the Territory of Kansas, as the Leavenworth, Pawnee and Western Railroad Company, with authority to construct the road from the west bank of the Missouri to the western boundary of the Territory. Subsequently, in 1862, under an Act of the State of Kansas, it assumed its present name, with authority to unite or consolidate with any other company or companies organized, or to be organized, under the laws of the United States, or of any State or Territory. Some months later, the Union Pacific Railroad Company was incorporated by Congress, with power (conferred by the original Act of 1862, and various amendatory Acts) to construct a railroad and telegraph westward. Several other railroad companies, already incorporated by Missouri and Iowa, as well as the company just mentioned, chartered by Kansas, were authorized to construct roads through the National territory, so as to join the Union Pacific road on the hundredth meridian; and to all these roads large grants of land were made, and large subsidies engaged on the security of a second mortgage, upon the condition of paying, at maturity, the bonds advanced by way of subsidy, and of rendering certain services to the Government in the transmission of messages, and in the transportation of mails, troops, munitions, and other property, at reasonable rates of compensation. But neither by the original Act, nor by any amendment, did Congress undertake to incorporate any railroad company, or authorize the construction of any railroad within the limits of any State, without the consent of the State concerned. And this was as true of the Union Pacific Railway Company, Eastern Division, as of any other of the roads aided by Congress. Whatever was done by Congress, in reference to this last-named road, was done not merely with the consent, but upon the solicitation of the State of Kansas. The corporation, however, remained a State corporation, though entitled to certain benefits, and subject to certain duties under the legislation of Congress. Mr. Hoar, Attorney General: 'This property is exempt from taxation for two

reasons: 1st, A minor one. Because by the sixteenth section of the charter of the company the State has the right to purchase the road at the end of fifty years. The section is as follows: The State has, therefore, an interest in the road—a special property—and by its fundamental law cannot tax it.' The *Chief Justice* delivered the opinion of the Court, saying: 'The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any Act of Congress. It is not asserted that any Act, declaring such exemption, has ever received the sanction of the National Legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. But we are not aware of any case in which the real estate, or other property of a corporation, not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government. The very ground of claim is in the bounties of the General Government. The allegation is, that the Government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the Government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants and this fully compensated employment, it is claimed that this State corporation, owing its being to State law, and indebted for these benefits to the consent and active interposition of the State Legislature, has a constitutional right to hold its property exempt from State taxation; and this without any legislation on the part of Congress, which indicates that such exemption is deemed essential to the full performance of its obligations to the Government. We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us in the affirmative."

So also in *Railroad Co.* v. *Peniston* (18 *Wall.*, 48), as has been already stated, the Court said:

These considerations show how totally different this case is from that of *Thomas* v. *Kansas Pacific Railway Company*. That was a State corporation, deriving its origin from State laws."

The same conclusion was reached, as has already been said, in *Western Union Co.* v. *P. R.R. Co.* (3 *Fed. Rep.*, 4), where the Court said:

"It is conceded that the Kansas Pacific Railway Company, Eastern Division, was originally chartered by an Act of the Legislature of Kansas as the Leavenworth, Pawnee and Western Railroad Company."

In *Arapahoe* v. *Kansas Pacific* (4 *Dillon*, 278), decided in 1877, the Kansas Pacific Company filed a petition for removal, upon the ground that it was a citizen of Kansas, and the removal was granted.

In *Washington* v. *Kansas Pacific* (5 *Dillon*, 489), decided in 1879, a like petition for removal was filed and granted, and the reported statement is:

"The plaintiff is a corporation created by the State of Pennsylvania; the defendant by the State of Kansas."

It is evident, therefore, that the Kansas Pacific Railway Company owes its corporate existence solely to an act of sovereignty by the State of Kansas, and that no act of sovereignty by the United States has ever attempted even to reinforce the charter powers granted by the State.

What is the object of a Corporation?

Such object is to bestow upon an artificial body the powers and capacities to a certain extent of natural persons.

In *Pawlett* v. *Clark* (9 *Cranch*, 227) the Court said:

"These capacities, attributes and rights, however, in order to possess a legal entity, and much more to be susceptible of legal perpetuity, must be invested in some natural or corporate body, for in no other way can they be exercised or vindicated. And so is the opinion of Lord Coke in 3 *Inst.*, 201, where he says: 'Albeit they [*i. e.*, subjects] might build churches without the King's license, yet they could not erect a spiritual politic body to continue in succession and capable of endowment without the King's license, but, by the common law before the statute of mortmain, they might have endowed the spiritual body once incorporated, *perpetuis futuris temporibus*, without any license from the King or any other.'"

In *Providence* v. *Billings* (4 *Peters*, 583) it was said:

"The great object of an incorporation is to bestow the character and property of individuality on a collective and changing body of men. This capacity is always given to such a body."

What is a Corporation?

This question is important, primarily, as to the duties of the artificial body, and, secondly, as to the power of the State over it.

A corporation is a moral person, and by intendment of law a citizen. It is entitled in a general sense to all the privileges, and is subject to all the duties, which appertain to natural persons or citizens.

Lord Coke, when speaking of the statute of Henry VIII., requiring the repairing of bridges, said that a corporation was "an inhabitant," and in *King* v. *Gardiner* (*Cowper's Rep.*, 78) they are called in reference to poor rates "inhabitants" or "occupiers."

In *Bank* v. *Deveaux* (5 *Cranch*, 91) the Court said:

"That corporations composed of citizens are considered by the Legislature as citizens under certain circumstances is to be strongly inferred from the registering acts. It could never be intended that an American registered vessel, abandoned to an insurance company, composed of citizens, should lose her character as an American vessel, and yet this would be the consequence of declaring that the members of the incorporation were to every intent and purpose out of view, and merged in the corporation."

In *Bank* v. *Earl* (13 *Peters*, 588) it was said:

"A corporation is indeed a mere artificial company, invisible and intangible, yet it is a person for certain purposes in contemplation of law."

In *United States* v. *Amedy* (11 *Wheat.*, 412) the Court said:

"Another question not raised in the Court below has been argued here, and upon which, as it is vital to the prosecution, we feel ourselves called to express an opinion. It is that a corporation is not a person within the meaning of the Act of Congress. If there had been any settled course of decision upon this subject in criminal cases we should certainly, in a prosecution of this nature, yield to such a construction of the Act. But there is no such course of decisions. The mischief intended to be reached by the statement is the same whether it respects private or corporate persons. That corporations are in law for civil purposes deemed persons is unquestionable, and the citation from 2 *Inst.* (736), says that they are so deemed within the purview of penal statutes. Lord Coke there, in commenting on the statutes of 13 *Eliz.*, ch. 7, respecting the erection of cottages, where the word used is 'no person shall, &c.,' says: 'This extends as well to persons politic and incorporate as to natural persons whatsoever.' Finding therefore no authority at common law which overthrows the doctrine of Lord Coke, we do not think we are entitled to engraft any such constructive exception upon the text of the statute."

In *Louisville* v. *Letson* (2 *How.*, 555) the Court said:

"A corporation seems to us to be a person."

In the same case the Court further said:

"Where a corporation exercises its powers in the State which chartered it, that is its residence."

In *Marshall* v. *Baltimore* (16 *How.*, 327) the Court said:

"A citizen, who has a contract with a corporation, may say that he did not deal with a metaphysical abstraction—that his writ has not been served on an imaginary entity, but on men and citizens—a juridical person."

In *Insurance Co.* v. *Francis* (11 *Wall.*, 216) the Court said:

"An averment that the defendant is a corporation according to the laws of the State of New York is in legal effect an averment that the defendant was a citizen of New York.

In *Railroad Co.* v. *Harris* (12 *Wall.*, 81) the Court said:

"For the purposes of Federal jurisdiction, a corporation is in law deemed a person, and it is to be regarded as a citizen."

In *Railway Co.* v. *Whiton* (13 *Wall.*, 283) the Court said:

"Where rights of action are to be enforced, a corporation will be considered a citizen of the State where it is created."

In *Miner* v. *Happersett* (21 *Wall.*, 166) the Court said:

"There cannot be a nation without a people. The very idea of a political community implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation. For convenience it has been found necessary to give a name to this membership. In this purpose, the word 'subject,' 'inhabitant,' or 'citizen,' have been used. 'Citizen,' is now more commonly employed."

In *United States* v. *Cruikshank* (92 *U.S.*, 549) the Court said:

"The citizens are the people who compose the community and have submitted themselves to the dominion of a government."

IF THE KANSAS PACIFIC RAILWAY COMPANY BE THUS A CITIZEN OF THE STATE OF KANSAS, WHAT ARE ITS DUTIES?

These duties are indicated both by the law of Nations, which in its fullest extent forms part of the law of England (*Triquet* v. *Bath*, 3 *Burr.*, 1481), and by the com-

mon law, in the definition which they give to the word "citizen," even if he be but a temporary resident.

The general definition is well stated in *Johns. Enc.*, as follows:

"*Citizen*, In modern law, is used to indicate the class of persons who owe an indefeasible allegiance to a state and are entitled to certain rights and privileges appertaining to freemen. This view prevailed at a date as early as the time of Bodin, A.D. 1576, who defines a citizen, to be 'a free subject holding of the sovereignty of another man.' Knolle's Translation, A. D. 1606."

In *Minor* v. *Happersett* (12 *Wall.*, 166) the Court said:

"Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entited to its protection. Allegiance and protection are in this connection reciprocal obligations. The one in compensation for the other. Allegiance for protection, and protection for allegiance."

In *Weldman's International Law* (*Vol.* 1, *p.* 39–40) it is said:

"All strangers are under the protection of a sovereign while they are within his territories and owe a temporary allegiance in return for their protection."

The principles of the common law, as was stated in *Van Ness* v. *Pacard* (2 *Peters*, 136), "our ancestors brought with them," and they were reënacted by the Territory of Missouri and the Territory and State of Kansas, as constituting a portion of the law of those Territories and of that State.

The Kansas Pacific Railway Company, therefore, having its place of operation within the State of Kansas—having within that State its personalty, its citzenship, and its property—owes an allegiance to the sovereignty of that State, and such allegiance implies obedience to its laws.

What are the rights of the State of Kansas as against the Kansas Pacific Railway Company?

It is a State corporation existing as such within the State, and owning and operating a railway therein. May the State compel it to obey its laws?

In *The Prize Cases* (2 *Black*, 673) the Court said, when speaking of citizens:

"Under the very peculiar constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they also owe a a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws."

Story on Conflict of Laws (§ 18) says:

"The laws of every State affect and bind directly all property whether real or personal within its territory, and all persons who are residents within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it."

In *Providence* v. *Billings* (4 *Peters*, 563) the Court said:

"The power of legislation operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in Government as a part of itself and need not be reserved when property of any description or the right to use it in any manner is granted to individuals or corporate bodies. This vital power may be abused, but the Constitution of the United States was not intended to furnish a corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security where there is no express contract. The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission,"

and as was said in *Cherokee* v. *State* (5 *Peters*), 29.

"In the exercise of a sovereign right the sovereign is the sole arbiter of his own justice."

The point was also well stated by counsel in a late case as follows:

"Each State retains complete, exclusive and supreme power over all persons and things within its limits where that power has not been specially granted or restrained by the Constitution, and in respect to all this mass of undelegated and undefined power the States stand to each other and to the general Government as absolutely foreign nations."

In support of this were cited: *Gibbons* v. *Ogden* (9 *Wheat.*, 203, 208); *Brown* v. *Maryland* (12 *Wheat.*, 419, 443); *Wilson* v. *Blackbird* (2 *Peters*, 251); *Buchner* v. *Finley* (2 *Peters*, 586, 590); *New York* v. *Miln* (11 *Peters*,

102, 139); *United States Bank* v. *Daniel* (12 *Peters*, 32, 34); *Rhode Island* v. *Massachusetts* (12 *Peters*, 720); *License Cases* (5 *How.*, 504, 588).

In this connection the language of the Court in *United States* v. *Cruikshank* (92 *U. S.*, 653) may be appositely cited:

"The very highest duty of the States when they enter into the Union under the Constitution is to protect all persons within their boundaries in the enjoyment of those unalienable rights with which they were endowed by their creator. Sovereignty for this purpose rests alone with the States."

Coming a little nearer to the actual case, reference may be made again to the language of the Court in *Railway* v. *Peniston* (18 *Wall.*, 488), where it was said:

"These considerations show how totally different this case is from that of *Thompson* v. *The Kansas Pacific Railroad Company*. That was a State corporation, deriving its origin from State laws, and subject to State regulation and responsibilities. It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the General Government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence, without its consent, or to attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions to which their position, as creatures of State legislation, renders them liable.

The State of Kansas, therefore, has the lawful right to compel the Kansas Pacific Railway Company to obey its laws.

What are the duties of the Kansas Pacific as a Railroad Corporation?

A corporation can make no valid contract without the sanction, express or implied, of the laws of the sovereignty which created it (*Bank* v. *Earl*, 13 *Peters*, 584; *Runyon* v. *Lessee*, 14 *Peters*, 129; *Perine* v. *Chesapeake*, 9 *How.*, 172).

The rights, duties and obligations of a railway company are defined in the Acts of the Legislature under which they were organized, and reference must be had to them to

ascertain the validity of its contracts (*Pierce* v. *Madison*, 21 *How.*, 442).

It cannot alienate its property or franchises so as to withdraw it from its obligation to fulfill the purposes for which the corporation was created, or so as to absolve it from its obligation to obey the laws of the State, unless such alienation is affirmatively sanctioned and authorized by the State.

In *York* v. *Winans* (17 *How.*, 39) the Court said:

"This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating the right to use, and its power of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the Legislature."

To the same effect are the cases of *Clearwater* v. *Meredith* (1 *Wall.*, 25) as to a railroad consolidation, and *Thomas* v. *Railroad Co.* (101 *U. S.*, 85) as to a railroad lease.

And this is so upon the general principle that all public grants are to be strictly construed, and that nothing can be taken as against the State by presumption or inference. (*Delaware Tax*, 18 *Wall.*, 225.)

The language of the case of *Thomas* v. *Railroad* (101 *U. S.*, 83) is worthy of full quotation. When speaking of this general subject the Court said:

"That principle is that where a corporation, like a railway company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

And this was cited with approval by McCrary, *J.*, in *Atlantic* v. *Union* (1 *Fed. Rep.*, 747).

So in *Branch* vs. *Jesup* (106 *U. S.*, 478) the Court said:

"But the road and franchises are generally inalienable; and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfillment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them."

Again, in *McCoy* v. *C. I. &c., R. R. Co.* (13 *Fed. Rep.*, 3), the Court said:

"Railroad corporations are *quasi* public corporations dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads which can be controlled by the public to the extent of the interest conferred therein. In the absence of some statute providing another and different remedy, courts of equity have jurisdiction to enforce this *quasi* public trust and compel railroad corporations to discharge the duties imposed upon them by law; and persons injured by the wrongful action or non-action of such corporations may seek redress by injunction, and are not bound to resort to proceedings in mandamus or to an action at law for damages."

Inasmuch as the Legislature has the same control over a corporation that it has over natural persons (*In re Watson*, 15 *Fed. Rep.*, 517, *and note* k), it may treat the railroad company in the aggregate as holding a public office, and compel the performance of its public duties by *mandamus* (*People* v. *N. Y. C. R.R. Co*, 28 *Hun*, 543).

The consolidation in question never having been authorized by the State, it is entitled to disregard the alienation attempted thereby of the franchises of the Kansas Pacific Company and to compel that company by any proper legal proceedings to perform all the public duties appertaining to its public office.

THE RIGHTS OF THE STATE IN THE CHARTER OF THE KANSAS PACIFIC RAILWAY COMPANY ARE RIGHTS OF PROPERTY WHICH CANNOT BE LAWFULLY IMPAIRED.

The State stands *in loco parentis*, and as *parens patriæ*, and as such it has a right to compel the continuous performance by the railway company of the obligations imposed by its charter, and in so doing to regulate the question of tolls (*Chicago* v. *Iowa*, 94 *U. S.*, 155; *Peik* v. *Chicago*, 94 *U. S.*, 169; *Munn* v. *Illinois*, 94 *U.S.*, 117)—to compel it to run its trains (*State* v. *Hartford*, 29 *Conn.*, 338)—to conform its railway construction so as not to interfere with the public (*Indianapolis* v. *State*, 37 *Ind.*, 489)—to construct fences and cattle guards (*People* v. *Rochester*, 14 *Hun*, 371)—to build bridges and keep them in repair (*People* v. *Troy*, 37 *How. Pr. Rep.*, 427)—to deliver grain in bulk to a particular elevator (*Chicago* v. *People*, 56 *Ill.*, 365)—to operate a railway on a bridge as a continuous portion of its main line (*U. S.* v. *U. P. R.R. Co.*, 4 *Dillon*, 479; 1 *Otto*, 343).

These are all rights which are vested in the State in its capacity as aforesaid for the protection of the citizens who compose the State. They are rights of property, because they relate to the uses of the property of the citizen, both for the permanent purposes of the railway and as to the amount of legal toll or compensation he may be compelled to pay.

These rights being thus vested, they are beyond the power of Congress to impair (12 *Fed. Rep.*, 761 *Note*). They constitute a contract as between the State and the corporation, which, upon a principle as old as Magna Charta—*nulli negabimus rectum aut justitiam*—is inviolable without the consent of the State.

Thus in the *Sinking Fund Cases* (99 *U. S.*, 718) the Court said:

"The United States cannot any more than a State interfere with private rights except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law."

In *Calder* v. *Bull* (3 *Dall.*, 386, 388) the Court said:

"There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule such an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law. * * * A few instances will suffice to explain what I mean * * * A law that destroys or impairs the lawful private contracts of citizens, * * * or a law that takes property from A. and gives it to B. It is against all reason and justice for a people to entrust a Legislature with such powers, and therefore it cannot be presumed that they have done it. * * * The Legislature * * * command what is right, and prohibit what is wrong; but they cannot * * * violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or State Legislature possesses *such powers*, if they had not been expressly restrained, would, in our opinton, be a political heresy, altogether inadmissible in our free republican governments."

But the State of Kansas has a more specific and direct contract right in this charter, which it is beyond the power of Congress to impair. The 16th Section is as follows:

"Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State or States through which said road shall pass shall be at liberty to purchase said road by paying to said company the amount which it shall be valued at by persons to be mutually chosen by the State and by said company; but two years notice shall be given to said company of the intention of the State to purchase said railroad."

This was the section upon which the Kansas Pacific Railway Company stood before the Supreme Court, when it undertook to maintain that it was under no obligation to pay the State its taxes upon its property.

A similar provision came under discussion in the case of *Turnpike Company* vs. *Illinois* (96 *U. S.*, 63), in which the Court said:

"The fifteenth section of the charter is in the following words: 'The State reserves the right to purchase said road at the expiration of said charter, by paying to said corporation the original cost of said road, laid out and expended in constructing the same, to be ascertained by examination of the books of

said corporation, by commissioners to be appointed by the legislature; and, in case of non-payment or redemption by the State at the expiration of the charter, the said road, with all its appendages, shall remain in the possession of said corporation, to be used, controlled, and possessed under the rights and restrictions in this charter contained, and may demand and receive tolls as herein stated, until such time as the State shall refund said sum of money, the original cost of construction, and which right the State hereby reserves,' * * * * the original charter of the company gave it the right, in consideration of building the turnpike authorized thereby, and of keeping it in repair, to erect certain toll gates, and to exact certain tolls for the use of the turnpike, until the expiration of twenty-five years from the date of the charter, and as much longer as the State should fail to redeem the franchises so granted, by paying the cost of the work. This was undoubtedly a contract."

It is objected to this clause of the charter, that it cannot, at the expiration of the given period, be lawfully carried into effect by reason of the provisions of Section 8 of Article 11 of the constitution of Kansas which is as follows:

"The State shall never be a party in carrying on any work of internal improvement."

This objection is not well taken. The charter by which the contract right was conferred upon the State was passed in 1855. The constitution was not ratified by the people until the 4th of October, 1859, and the State was not admitted until the 29th of January, 1861. The objection overlooks the well-settled rule that constitutional prohibitions are always, and of necessity, to be interpreted prospectively, and are never to be interpreted as having a retrospective action to invalidate existing contracts.

This was expressly decided in *People* v. *Brooklyn* (89 *N. Y.*, 86); *Matter of Gilbert* (70 *N. Y.*, 372), and in *Smith* vs. *County*, (54 *Mo.*, 70).

The latter case was almost precisely parallel. A corporation before the Constitution, and by a charter granted on the 9th of February, 1857, had been authorized to secure the issuance of county bonds without a previous vote of the electors of the county. The Constitution of 1865, provided in the 14th Section of Article 11 as follows:

"The general assembly shall not authorize any county, city or town, to loan its credit to any company, association or corporation, unless two-thirds of

the qualified voters of such county, at a regular or special election to be held therein, shall assent thereto."

On the 10th of June, 1865, the County of Clark issued and delivered its bonds, though at preceding elections held in November, 1864, and in June, 1865, a majority of the resident voters had voted not to subscribe the amount for which the bonds were issued. The question arose, whether the constitutional inhibition defeated the right of the company and of the county under the charter of 1857 to issue bonds without the previous sanction of the voters, and it was held that the constitutional provision did not effect a repeal of the privileges contained in the special charter.

In *County* vs. *Nicolay* (95 *U. S.*, 619) it was held—

"Where the charter of a railroad company granted by Missouri prior to the the adoption of the constitution in 1865 made it lawful for the county court of any county in which any part of the route of such railroad or its authorized branches might be, or for any county adjacent thereto, to subscribe to the stock of the company and to issue bonds of the county in payment therefor, the power of the county so to subscribe did not become subject to the 14th section of Article 11 of that constitution which requires the assent of two-thirds of the qualified voters of the county to such subscription."

This was affirmed in *County* v. *Thomas* (98 *U. S.*, 169) and in *County* v. *Gillette* (100 *U. S.*, 585).

Again. A State constitution is simply a State statute, and like all statutes is to be interpreted as prospective only unless a contrary intent is expressed in the statute itself (*Harvey* vs. *Tyler*, 2 *Wall*, 347; *Warren* vs. *Etna*, 2 *Paine*, 501; *In re Wall.*, 8 *Fed. Rep.*, 81).

The status within the State of lands granted by Congress to Railway Corporations.

As has been said, the fee of the public lands is originally in the United States. They are alienated by means of patents or by direct grant constituted by positive enactment.

It was said in *U. P. R.R. Co.* vs. *McShane* (22 *Wall.*, 444, 462) that:

"The United States retains the legal title by withholding the patent. * * When the grant has been perfected by the issue of a patent the right of a State to tax, like the right of a company to sell the lands, has become perfect."

This establishes that the granted lands fall within the domain of the State for taxation; and if they so fall for such purpose, they also for every other purpose within the jurisdiction of the State. The right to tax is one of the highest rights of sovereignty, for it involves the right to sell and transfer the thing upon which the tax is levied. If the State, therefore, has the right to tax the roadway and lands of the Kansas Pacific Railway Company for the benefit of the State, and to sell the lands granted if the tax is not paid, *a fortiori* has it the right to control the user of the lands and of the structure built thereon in such manner as shall best secure the welfare of the people of the State.

This principle found its vindication in *U. P. R.R. Co.* v. *M. R.R. Co., in Neb.* (3 *Fed. Rep.*, 110), in which McCrary, *J.*, said:

"I am clearly of the opinion that the right of way of the Union Pacific Railway is not property of the Federal Government set apart for its own public use, so as to exempt it from the operation of the law of the State of Nebraska, above quoted, respecting the crossing and connecting of railroads, and the condemnation of property for those purposes. It is the property of the corporation acquired under a law of the United States. If, however, it were conceded to be the land of the United States unless held for governmental purposes, it would, even in that case, be subject to the State's power of eminent domain. * * It has been held by the Supreme Court of the United States that the Pacific Railroad is subject to State taxation (*The Railroad Company* v. *Peniston*, 18 *Wall.*, 5). It was insisted in that case that the Pacific Railroad was created by Congress for public and national purposes, and that, like a national bank, it was an instrument of the General Government, and not subject to State jurisdiction for purposes of taxation. But this position was not sustained. It is difficult to see upon what principle property can be held to be so exclusively within the Federal jurisdiction as to be beyond the reach of the State's power of eminent domain, and yet subject to State taxation."

When Congress gave the right of way and alternate sections of land to the Kansas Pacific Railway Company, it

parted with all its rights, including the right to exercise sovereignty thereover, and it so parted with the same because in the instrument of transfer it did not reserve to itself any rights of any kind. The land therefore passed to the Kansas Pacific Railway Company in like manner as it would have passed to any other citizen of the State of Kansas, and so passing it fell within the rightful power of the State to exercise dominion over the same for all public purposes in like manner as it could exercise dominion over the property of a private citizen.

The mere fact that Congressional power has been antecedently exercised over the subject-matter of that which finds its way within the State does not withdraw such subject-matter from the domain of the State.

This was very clearly stated in *Bloomer* v. *McQuewan* (14 *How.*, 549) as follows:

"But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different ground. In using it he exercises no rights created by the Act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him whether he had a patent or not, if no other patentee stood in the way. And when the machine passes to the hands of the purchaser it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress, and if his right to the implement or machine is infringed, he must seek redress in the Courts of the State, according to the laws of the State, and not in the Courts of the United States, nor under the law of Congress granting the patents. The implement or machine becomes his private individual property, not protected by the laws of the United States, but by the laws of the State in which it is situated. Contracts in relation to it are regulated by the laws of the State and are subject to State jurisdiction. Like other individual property, it is then subject to State taxation."

In *Jordan* v. *Overseers* (4 *Ohio Reps.*, 295) it was held that a patent issued by the United States securing the exclusive right to manufacture and use certain medicines, did not authorize the administration of them in the character of a practicing physician without conforming to the laws of the State where administered. The Court said:

"The sole operation of the statute is to enable him to prevent others from using the products of his labor except with his consent; but his own right of

using is not enlarged or affected. There remains in him, as in every other citizen, power to manage his property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to State control. If the State should pass a law for the purpose of destroying a right created by the Constitution, this Court will do its duty; but an attempt by the Legislature in good faith to regulate the conduct of a portion of its citizens in a matter strictly pertaining to its internal economy we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal Government."

In *Webber* v. *Virginia* (103 *U. S.*, 344) it was said:

"The right conferred by the Patent Laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property in which the invention or discovery may be exhibited or carried into effect from the operation of the tax and license laws of the State. The legislation respecting the articles which the State may adopt after the patents have expired it may equally adopt during their continuance. The right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."

A somewhat analogous case is that of *McCready* v. *Virginia* (94 *U. S.*, 394), in which the Court said:

"The precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege. The principle has long been settled in this Court that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away (*Pollard's Lessee* v. *Hagan*, 3 *How.*, 212; *Smith* v. *Maryland*, 18 *How.*, 74; *Munford* v. *Wardwell*, 6 *Wall.*, 436; *Weber* v. *Harbour Commissioners*, 18 *id.*, 66). In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty (*Martin* v. *Waddell*, 16 *Pet.*, 410). The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter State commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their

citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

It results, therefore, that there is nothing in the fact that the fee of the road-bed and of the alternate sections of land of the Kansas Pacific Railroad was originally in the United States, which withdraws such road-bed and lands from the domain of the State, or abridges its right to require the obedience of their owner to such laws as the State of Kansas in its sovereignty may see fit to pass for the promotion of the general welfare.

THE CONSOLIDATION STATUTE OF KANSAS OF 1870 WAS A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

It is obvious that this statute is limited in its application, first, to railways within the State of Kansas, and secondly, to railways "duly organized and existing under the laws of an adjoining State," and did not, therefore, authorize any consolidation of the Kansas Pacific Railroad Company as a Kansas incorporation with the Union Pacific Railroad Company as a Federal incorporation.

It is further obvious that the consolidation between the Kansas Railway and a railway in an adjoining State can only be legally affected when the railway in the adjoining State connects with a railway of Kansas at the State line so as to form one completed and continuous line of railroad. It would be impossible to bring the line of the Kansas Pacific and the Union Pacific Railroad Company within this prescription of the statute.

It is further obvious that the railroads of Kansas, when consolidated, are subject to all the obligations and liabilities to the State which belonged to or rested upon them at the time of making such consolidation. Even if, therefore, the Kansas Pacific Railway Company had been law-

fully consolidated with the Union Pacific the former would still be under the obligation of obeying the laws of the State.

The lines of the Kansas Pacific and the Union Pacific Railway Companies bring them within that class of railways which are known as competing. They are parallel lines running through different States and reaching, substantially, and by means of their connections, the same points. It was the policy of the State of Kansas, as evidenced by the Act of 1870, not to permit the consolidation of competing lines.

The effect of such consolidation is to prevent competition and therefore to withdraw from the public the benefit of competition which always results in a lowering of rates and generally in improvement of equipment and increase of speed.

From time immemorial it has been held that contracts in restraint of commerce are void as against public policy. So also it has been held, and with equally emphatic utterance, that contracts tending to prevent competition and to deprive the public of the benefits thereof over avenues of commerce are invalid and that no lawful rights can accrue thereunder.

This was settled by the cases of *Denver* v. *Atchison* (15 *Fed. Rep.*, 650-655); *Hartford* v. *New York* (3 *Robertson*, 411); *Stanton* v. *Allen* (5 *Denio*, 134); *Hooker* v. *Vanderwater* (4 *Denio*, 349); *Morris* v. *Barclay* (68 *Penn. St.*, 173); *Pullman* v. *Texas* (11 *Fed. Rep.*, 625); *Marsh* v. *Russell* (66 *N. Y.*, 288); *Hays* v. *Pennsylvania Coal Co.* (12 *Fed. Rep.*, 309); *Oregon* v. *Winsor* (20 *Wall.*, 64); *Green's Brice's Ultra Vires* (2*d Ed.*) 419 and *note*; *Morawetz on Corporations* (§§ 39, 224); 1 *Wharton on Contracts*, §442*a*; *Sandford* v. *Catawissa* (24 *Penn. St.*, 378); and of *Stewart* v. *Erie* (17 *Minn.*, 372), where the Court said:

"But we agree with the plaintiff's counsel and with the cases by him cited that it is against the general policy of the law to destroy or interfere with free competition or to permit such destruction or interference."

Any statute which tends to promote the general welfare by regulating the user of that which is within the territory of the State so as to promote the public convenience and welfare and to secure to it the benefits of improved structures, higher speed and lower rates of toll, falls directly within the police powers of the State.

The Act of Congress (11 *Stats.*, 9) granted lands to Iowa to aid in the construction of railways. The Chicago, Burlington and Quincy leased the Burlington and Missouri Railroad in Iowa. That State passed an act to establish maximum rates of charges. The Chicago, Burlington and Quincy Company appealed to the Supreme Court and argued (*Chicago, &c.*, v. *Iowa*, 94 *U. S.*, 155) that the State law was unjustifiable, both in view of the fact that the lands had been originally granted by Congress and that it was an interference with the commercial clause of the Federal Constitution. The Court said:

"This road, like the warehouse in *Munn* v. *Illinois*, is situated within the limits of a single State. It is employed in State as well as inter-State commerce, and until Congress acts the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its jurisdiction."

A similar act was passed in Wisconsin. It was argued (*Peik* v. *Chicago*, 94 *U. S.*, 169) that such an act violated the principle of the Congressional grant (11 *Stats.*, 20), that the companies receiving its benefit should remain public highways. The Court said:

"The United States do not complain. It will be time for us to consider this objection when they do."

In *Beer Co.* v. *Massachusetts* (97 *U. S.*, 25) it was said that—

"All rights are held subject to the police power of the State. It extends to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals."

In *Railroad Co.* v. *Fuller* (17 *Wall.*, 560) it was held that a State statute requiring railways annually to fix rates of freight and to post the same was valid as an exercise of the police power, promoting the public welfare, and called for by the interests of the community and resting upon a solid foundation of reason and justice; the Court saying:

"It is a police regulation, and as such forms a part of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government—all of which can be most advantageously exercised by the States themselves."

In *Sherlock* v. *Alling* (93 *U. S.*, 99) it was held that the legislation of a State relating to the rights, duties and liabilities of citizens, and which only indirectly affected the operations of commerce, was obligatory upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce or in any other pursuit.

It was upon this same principle that a statute of the State (*Roe* v. *Grand Trunk*, 14 *Fed. Rep.*, 401) requiring a railway to draw the cars of other railway corporations was upheld.

In *Railroad Co.* v. *Husen* (95 *U. S.*, 465) the Court said:

"We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety, * * it extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State. According to the maxim *sic uteri tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. * * By the general police power of a State persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

In *Gibbons* v. *Ogden* (9 *Wheat.*, 203) Marshall, *C. J.*, said:

"The inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the inter-State commerce of the States, and those which respect turnpike roads, ferries, &c., are component parts of this mass. No direct general power over these objects is granted to Congress, consequently they remain subject to State legislation. If the legislative power of the Union can reach them it must be for national purposes. It must be where the power is expressly given for a special purpose or as clearly incidental to some power which is expressly given."

This decision was made in 1824, three years before the first railroad—the Baltimore and Ohio—was chartered and six years before the road was opened from Baltimore to Ellicott Mills. Had Congress at that early day exercised the power of creating railway incorporations doubtless there would have been included in this opinion after the words "turnpike roads, ferries, &c," the words "railway corporations."

Again. Coming a little nearer to a railway, Chancellor Kent (2 *Kent's Coms.*, 340) said:

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."

The Act of the State of Kansas of 1870, therefore, preventing the consolidation of competing roads and securing the benefit of railway competition to the people of the State at large, was concededly a proper exercise of the police of the State.

The effect of the alleged consolidation upon the State of Kansas.

If such consolidation were justified by the Act of 1870 it would still, in the language of the Act, leave the Kansas Pacific Railway Company subject,

"to all the obligations and liabilities of the State which belonged to or rested upon it at the time of making such consolidation."

This would make the consolidated company still subordinate to the general laws of the State.

If the act of consolidation were justifiable under the consolidating statute of Kansas of 1865, the Kansas Pacific Railway Company would still be subordinated to the jurisdiction of the State, because such Act does not release it from any of its obligations or duties to the State; and the same remark would apply to the consolidation if it were justified under the statute of Kansas of 1862.

It is admitted, however, that the Act of 1862 was repealed or became obsolete by not passing into the revision of the Compiled Laws. The same admission is properly to be made with regard to the Act of 1865. To this may be coupled the suggestion that although the Kansas Pacific Railway Company now pretends to have consolidated itself by virtue of the provisions of this statute of 1865, it is evident that such assertion is but a pretense. The Act of 1865 was very specific in its prescription as to the provisions which the articles of consolidation must contain, and among other things, it provided that the places of residence and numbers of the directors of the consolidation, and the time and place of holding the first election of such directors should be specifically stated. It was also provided that the articles of consolidation should prescribe or provide

"the manner of compensating stockholders in each of said two or more corporations, who refuse to convert their stock into the stock of such new corporation."

Neither of these three provisions were complied with in the articles of consolidation now relied upon, and it is therefore quite evident that the suggestion that such articles were prepared under the sanction and authority of the Act of 1865 is an afterthought.* But assuming for the moment, and for the moment only, the integrity of the consolidation,

* This act of 1865 did not authorize the consolidation of the Kansas Pacific with the Union Pacific because the two roads did not form a continuous or connected line as the act required.

and the question arises, What was its effect upon the State of Kansas?

In *Tomlinson* vs. *Branch* (15 *Wall.*, 460) it was said that

"where two railroad companies are consolidated the presumption is that each of the two united lines of road are to be respectively held so far as the rights of the public are concerned with the privileges and burdens originally attaching thereto."

This presumption attaches to the articles of consolidation in question, and it is strengthened by the specific language of the Act of Congress of July 2, 1864, which provides in its 16th section that such consolidation is to be in such manner as

"shall not be incompatible with this Act or the laws of the State in which the road of such companies may be."

This would leave the Kansas Pacific Railway Company still subject to the domain of the State and with power upon its part to exact prompt and implicit obedience to its laws.

Again. It is an universal rule that notwithstanding a consolidation the State has a right to sue the original corporation, and a railroad corporation cannot defeat that right by alleging that by virtue of the consolidation it has become a foreign corporation, or a federal corporation, and was therefore clothed with the right to withdraw itself from the jurisdiction of the State Courts. This was abundantly settled by the case of *Johnson* v. *P. W. & B. R.R. Co.* (9 *Fed. Rep.*, 6, and *note*), and the reason for the rule was stated in the case of *Horne* v. *Boston* (18 *Fed. Rep.*, 50) to be—

"For the purpose of giving each State its legitimate control over the charters which it grants."

This rule found emphatic enunciation also in *Graham* v. *Boston* (14 *Fed. Rep.*, 753), in which the Court said:

"It thus appears that the corporation was made up of several distinct corporations, chartered by the legislatures of the different States, and all consolidated and merged into one corporation under the laws of all the States. It therefore became one of that class of corporations so numerous in this country owning a railroad extending through two or more States and chartered under the laws of each. In such cases the corporation has a common stock, the

same shareholders and officers, the same property and a single organization, and is for most purposes one corporation. But it is a separate corporation in each State so far that it is governed by the laws of each State within its own territory. Such a corporation is considered to have a domicil in each State, and in the absence of any statutory provision to the contrary may hold its meetings and transact its corporate business in each."

The same principle was affirmed in *Muller* v. *Dows* (94 *U. S.*, 447), in which the Court said:

"It is argued on behalf of the appellants that the Chicago and Southwestern Railway Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa Company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence, it is argued, the corporation was created by the laws of Iowa and of Missouri; and as Burns, one of the plaintiffs, is a citizen of Missouri, it was inferred that the Circuit Court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the State with others outside of the State, were that 'any railroad company, organized under the laws of the State, or that might then be organized, should have power to intersect, join and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the State line, or at any other point, as might be mutually agreed upon by said companies'; and such railroads were authorized 'to merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further. Doubt in regard to it is put at rest by the decision of this Court in *Railway Company* v. *Whitton's Administrator* (13 *Wall.*, 270). There a similar question arose. A suit was brought by a citizen of Illinois in the State of Wisconsin, and it became a question whether the Federal Circuit Court of the latter State could entertain jurisdiction. The company, sued at first in the State Court, resisted an application to remove the case into the United States Circuit Court, on affidavits that it was a corporation created by, and existing under, the laws of the States of Illinois, Wisconsin and Michigan; that its line of railway was located, in part, in each of these States; that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exercised, and its affairs managed and controlled, by one board of directors and officers; that its principal office and place of business was at the City of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin. Nevertheless, the Circuit Court took jurisdiction of the case; and this Court held correctly, remarking that 'the defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or citizen of any other State. Being there sued, it can only be brought into Court as a citizen of that State, what-

ever its *status* or citizenship may be elsewhere.' In view of this decision it must be held that the objection to the jurisdiction of the Circuit Court of Iowa is unsustainable."

In reference again to the 16th section of the Act of Congress of July 2d, 1864, it is to be observed that that section does not purport to create a new corporation. It authorizes a consolidation, and then provides that such consolidation when so made and such organization when so formed shall be entitled to receive from the Government of the United States "all and singular the grants, benefits and immunities," &c., which were given to it by the Government originally.

In this point of view it may not be inopportune to cite again the case of *Central Railroad* v. *Georgia* (92 *U. S.*, 670), in which the Court said:

"It may be that the consolidation of two corporations, or amalgamation as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it."

That the particular consolidation in question in this suit has not yet received the stamp of judicial approbation is abundantly shown by the language of the opinion in *Western Union Telegraph Co.* v. *Kansas Pacific Railway Co.* (4 *Fed. Rep.*, 286), in which the Court said:

"To prevent such action the telegraph company filed, in the District Court of Arapahoe County, the original bill in this cause against the Kansas Pacific Railway Company and the American Union Telegraph Company, and, on the 26th of February last, obtained from the Judge of that Court an order restraining the Kansas Pacific Railway Company from interfering in any manner with the plaintiff's possession of the telegraph line. A writ of injunction was issued out of that Court, pursuant to such order, and due service thereof made on the officers of the railway company. The latter, assuming to be officers of another corporation called the Union Pacific Railway Company, which was organized about the 1st of February last by consolidating the Union Pacific Railroad Company and the Denver Pacific Railway and Telegraph Company with the said Kansas Pacific Railway Company, disregarding the writ, took

possession of the telegraph line for and in the name of the said Union Pacific Railway Company. The cause was afterwards removed into this Court under the Act of Congress of 1875, and a supplemental bill was filed, in which the said Union Pacific Railway Company consolidated, and others, were made defendants with the Kansas Pacific Railway Company. In this bill and upon the argument, the right of the several corporations before mentioned to unite in the manner pursued in organizing the Union Pacific Railway Company is denied; and it is claimed that the officers of the railway company, whether acting for the Union Pacific Company, assuming that Company to have been legally organized, or for the Kansas Pacific Company, were guilty of disobedience to the writ of injunction issued from and out of the District Court of the State, for which they should be punished. When that question shall be considered it may become necessary to examine the proceedings of the several corporations looking to consolidation, and to determine whether they are effectual; and, if the consolidation shall be recognized, then it may become necessary to determine whether the officers of the consolidated company could lawfully disobey a writ directed to one of the companies forming such consolidation. The argument at the bar was not directed to those questions, but rather to the case made in the supplemental bill to enjoin the defendants from any further use of the telegraph line, except as provided in the contract. The validity and force of the consolidation is not necessarily involved in the issuance of a new writ, for the consolidated company, if properly organized, can claim no higher or better right than its predecessor, the Kansas Pacific Company. Upon the case made in the supplemental bill the rights of all parties are referred to the contract, and, accordingly, that instrument has been attacked by defendants upon several grounds, which will now be discussed."

It is obvious, therefore, that, under the provisions of this rule interpreted and enforced by these very emphatic decisions, the State of Kansas has the lawful right to ignore the alleged consolidation, and to sue the Kansas Pacific Railway Company as a citizen of the State of Kansas, solely and only incorporated by virtue of the charter which the State granted to it.

The Position of the Kansas Pacific Railway Company.

The position of the defendant as taken in its answer and in various briefs which have been heretofore submitted may be summarized thus—

1. The Kansas Pacific Railway Company having been under a former name specifically mentioned in the Acts

of Congress of July 1, 1862, and July 2, 1864, was authorized to consolidate itself with the Union Pacific Railroad Company, also specifically mentioned in said Acts, and the contract of consolidation by virtue of such Acts became the Federal charter of the consolidated company.

2. That in effecting such consolidation the specified companies had a right to effect the same under the State statutes of 1862 and 1865, or to disregard the same, because compliance therewith was dispensed with by the section of the Act of July, 1862, which authorized the consolidation of the companies in such Act mentioned.

3. That if this position be incorrect and the consolidation was, by the Acts of July 1, 1862, and July 2, 1864, subordinated to the laws of the State, yet it was only so subordinated to such laws as were in force at the date of the passage of the two Acts of Congress, and that such acts did not require the observance of the consolidating statutes of the State of Kansas which were passed subsequently thereto.

It is urged in support of these views that the consolidating statutes of Kansas of 1862 and 1865 became a portion of the charter of the Leavenworth, Pawnee and Western Railroad Company, and as such became so incorporated therein that it was beyond the power of the State to repeal them. Hence the argument is that those two acts and the charter constituted a contract which it was beyond the power of the State to impair.

This argument is not sound. It was part of the general law of the country that without the consent of the State no railroad company could consolidate itself with or lease itself to another. The State statutes of 1862 and 1865 gave the assent of the State to a consolidation, but those acts were not mandatory. They were permissive only and did not become a part of the charter of the Kansas Pacific Company. If the two Acts of 1862 and 1865 had been repealed, the charter of 1855 and its supplement of 1857 would have

remained intact and unaffected by the repeal. But if the two Acts of 1862 and 1865 did become a part of the charter, such charter was expressly subject by the provisions of the preceding statute of the Territory of Kansas, and by the provisions of the State Constitution, to repeal or modification in such manner as the legislature might elect. There is therefore no force in the position that the Acts of the State of 1862 and 1865 either became a portion of the charter of the Kansas Pacific Railway Company, or that they became an irrepealable portion thereof, so that the State could not retract the permission therein given.

The position that the Acts of Congress of 1862 and 1864 did not require the companies therein named to observe the prospective legislation of the State is not well founded.

The Kansas Pacific Railway Company assert that its alleged consolidation was formed in strict compliance with the provisions of the consolidating statute of the State in 1865, which was passed subsequently to the two Acts of Congress. The company, therefore, claims the right to interpret the Acts of Congress as embracing prospective State legislation when it is in aid of the position of the company, and it denies such interpretation when it desires to contest the right of the State.

It is to be conceded that the consolidating clause to be found in the 16th section of the Act of Congress of July 1, 1862, does not, in terms, refer to the laws of the State, and, therefore, the interpretation of that section does not present the question whether the consolidation authorized by such section 16 must be made with reference to the laws of the State which were in force at the time when the consolidation was attempted to be made. Section 16, however, of the Act of Congress of July 2, 1864, does, in terms, refer to the State legislation, and the assertion of the defendants is that such reference does not embrace the legislation of the State subsequent to July 2, 1864.

This position is not sustained by the language of the section, which is:

"Any two or more of the companies authorized to participate in the benefits of this Act are hereby authorized at any time to unite and consolidate their organizations upon such terms and conditions * * * * as shall not be incompatible with this Act or the laws of the State or States in which the road of such companies may be."

Here the grant of the power to consolidate expressly embraces the future, because the language is "are hereby authorized at any time," and it is this consolidation, so authorized to be made at any time—that is, in the future—which, by the express language of the section, is required to be agreed upon "in such manner as shall not be incompatible with the laws of the State or States in which the road of such companies may be." Certainly no stronger prospective words are known to our language than the words here used—"shall be."*

This, therefore, makes the law of the State, as it existed at the time of the consolidation, the law which is to be observed in effecting the consolidation.

Again. If the consolidation could be at any time, it was authorized to be at any period after July 2d, 1864, and if it was to be when made "in such manner as shall not be incompatible with the laws of the State," it was to be so made in such manner "as shall not be incompatible with the laws of the State" which existed at the time when the consolidation was made.

It was the obvious intent of Congress not to authorize a consolidation in violation of the laws of the State, and it intended to apply the laws of the State at the time when the consolidation was sought to be effected. It uses the

* These are the precise words (*R. S.*, § 721) under which the laws of the States are made rules of decision in the Federal Courts in trials at common law, and under which the subsequent laws of the States are always applied.

language "in such manner as shall not be incompatible," &c. The question is, When? That is answered by the preceding language, *i. e.*, "at any time" when such consolidation is attempted to be made.

Further. The act of consolidation does not derive any validity from professing on its face to have been made under the Acts of Congress, nor is the federal incorporation of the defendant established by invoking such acts and the act of consolidation and calling either them or it "a charter." This was well settled by the decision in the case of *Mechanics' Bank* v. *Bank* (5 *Wheat.*, 326).

The Position of the State with Reference to the Acts of Congress of 1862 and 1864.

1. The State of Kansas is a sovereign State, with all the individuality which the word implies.

2. As sovereign it has supreme and exclusive control within the State of all that relates to the welfare and prosperity of its people.

3. In its position as *parens patriæ* it has an exclusive right to regulate and control its public highways as may be best for the public good.

4. It created the Kansas Pacific Railway as a public highway within its own borders for the public use and benefit (*The Civil Rights Cases*, 3 *Sup. Ct. Rep.*, 41), and in the exercise of its legitimate power it has forbidden it to make such a consolidation as is here relied upon.

5. The Act by which it was admitted as a State expressly declared that it was so "admitted on an equal footing with the original States in all respects whatever." This gave it an equality of constitutional rights and power, (*Escanata Co.* v. *Chicago*, 107 *U. S.*, 689) and as much right

over the public highways within her territory as Alabama was adjudged (*Pollard* v. *Hagan*, 3 *How.*, 212) to have over the lands in that State below high-water mark; as Delaware was adjudged (*Wilson* v. *Blackbird*, 2 *Peters*, 245) to have over Blackbird Creek; as Pennsylvania was adjudged (*Gilman* v. *Philadelphia*, 3 *Wall.*, 713) to have over the Schuylkill River; and as Kentucky was adjudged (*Strader* v. *Graham*, 10 *How.*, 82) to have over the domestic and social condition of those domiciled within her territory.

6. As a State it stands upon the 10th Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the States respectively or to the people," and it asserts that the Constitution does not prohibit it from passing such laws as it may elect in relation to the consolidation of highways within the State, and that it never delegated expressly, and therefore not by implication (*Jefferson* v. *Kelley*, 1 *Black*, 436; *Gilbert Elevated Railroad*, 70 N. Y., 368), any right or power to the United States to authorize or prohibit the consolidation of railways created by the State and operated within the State for the use and benefit of the people of the State. It further asserts that the United States have no constitutional power to exercise municipal jurisdiction of any kind over the creations of the State acting within the State and claiming and receiving the benefit of its protection.

7. That the consolidation of State railways is not a regulation of commerce within the Constitution. It is a question of finance simply, to be legally resolved by the stockholders only, who are the only parties affected thereby. The stock alone is changed by the consolidation, and all previous duties and obligations remain in force.

8. That when such consolidation takes place the franchises and privileges of each in respect to their several roads re-

main and continue (*County* v. *Conners*, 3 *Sup. Ct. Rep.*, 69), and each is respectively held with the privileges and burdens originally attaching thereto (*Tomlinson* v. *Branch*, 15 *Wall.*, 469), and each retains its original *status* towards the public and the State the same as if the consolidation had not been made (*Branch* v. *City*, 92 *U. S.*, 677).

9. It asserts that no legal consolidation can take place without the concurrent vote of the stockholders (*Zabriskie* v. *Hackensack*, 18 *N. J., Eq.*, 183; *Black* v. *Delaware*, 24 *N. J. Eq.*, 462; *Boston* v. *New York*, 13 *R. I.*, 261; *Cass* v. *Manchester*, 9 *Fed. Rep.*, 640; *New Orleans* v. *Harris*, 27 *Miss.*, 517, 526; *Mowrey* v. *Indianapolis*, 4 *Biss.*, 78; *Clearwater* v. *Meredith*, 1 *Wall.*, 78); and such stockholders can so lawfully ratify the same only by reason of the fact that they are such holders of the stock. It recalls the answer of the Kansas Pacific Company herein, which alleges "that the articles of consolidation were ratified and approved by 199,084 shares out of 200,000 shares in the Kansas Pacific Railway Company." It also recalls the fact that each and every of such shares was created and authorized by the State of Kansas alone by the charter and supplements which it granted, and not in any manner by the United States, and it asserts that such shares could not lawfully be used to vote in favor of a consolidation which violated the letter, spirit and intent of the State consolidating Act of 1870, nor to effect such violation could such shares be lawfully assigned and transferred to the new company in exchange for its stock. Such vote, assignment and transfer were alike prohibited by section 20 of the defendant's charter, which is in these words:

"The stock of said company shall be considered personal property and shall be assignable and transferable according to such rules and restrictions as the board of directors shall from time to time make and establish, subject, however, to the laws of the Territory, or any future State erected out of this Territory, as the same may be made."

10. It asserts that the Kansas Pacific Company had no authority without the consent of the State to increase its stock—which consent it has never given—and that the Union Pacific Railroad Company was forbidden by law (*U. S. R. S.*, § 5256) to increase its stock "without leave of Congress"—which was never obtained—and that an unauthorized issue of stock is not an element in determining the relations of the State to the Federal Government or to the Acts of Congress of 1862 and 1864.

11. It avers that the Union Pacific Railroad Company is as to the State a foreign corporation, and that as such it has no lawful right to exist within the State without its consent, which has never been given, and that the State has lawful power to exclude it therefrom and as by this suit it is attempting to do (*Lafayette Bank* v. *French*, 18 *How.*, 404; *Paul* v. *Virginia*, 8 *Wall.*, 168; *Ducat* v. *Chicago*, 10 *Wall.*, 410; *Doyle* v. *Continental*, 94 *U. S.*, 535). If the State has the power to exclude it, its intention or the reasons by which it is influenced in so doing cannot be enquired into; but if any reason were needed to support the action of the State, it is to be found in the unlawful attempt of the Union Pacific Company to gain a foothold within the State and to induce the Kansas Pacific Company to violate the laws of the State.

12. It asserts that the charter of the Kansas Pacific Company constituted a contract with the State (*Chicago* v. *Iowa*, 24 *U. S.*, 161), by which it acquired certain rights (*U. P. R.R. Co.* v. *U. S.*, 104 *U. S.*, 662), and that such rights could not lawfully be impaired by the Acts of 1862 or 1864 or by anything done under them.

13. It avers that the police power of the State authorizes it to enforce its statutes in relation to railways against any and all railways created by and doing business within the

State. Such railways are "private corporations for profit" (*Comp. Laws*, 215; *Chap.* 105 *of* 1872; *Chap.* 70 *of* 1873), and their regulation falls within every just definition of the police power of the State.

14. It asserts that Congress has no power by an act of consolidation, or otherwise, to withdraw a State corporation from the domain and control of the State, and to give it, or to undertake to give it, its only domicil and justiciability in a foreign State, whether as a federal corporation or otherwise. No such power was ever delegated by any of the States to Congress, and there is no inherent right in that body to exercise it.

BY THE TRUE CONSTRUCTION OF THE ACTS OF CONGRESS OF JULY 1ST, 1862, AND JULY 2D, 1864, IT AFFIRMATIVELY APPEARS THAT CONGRESS ACKNOWLEDGED, AND INTENDED TO ACKNOWLEDGE, THE SOVEREIGNTY AND SUPREMACY OF THE STATE.

The Act of July 1st, 1862, was passed to aid in the construction of a railroad from the Mississippi River to the Pacific Ocean. It created a corporation for that purpose and styled it "The Union Pacific Railroad Company." It then sanctioned the utilization for the intended purpose of certain corporations previously created by Territorial or State law, and which were specifically named with a recognition of their local incorporation as follows: "The Leavenworth, Pawnee and Western Railroad Company of Kansas," "The Central Pacific Railroad Company, a corporation under the laws of California," "The Hannibal and St. Joseph Railroad of Missouri," "The Pacific Railroad Company of Missouri." There were thus five companies named in the Act—one of Federal and four of State

or Territorial incorporation. The defendant relies upon the 16th Section of the Act as justifying the consolidation of the Union Pacific, Kansas Pacific and Denver Pacific Railway Companies. The Denver Pacific Company not having been named in the Act is not authorized to claim any power or right thereunder. The 16th Section is as follows:

"And be it further enacted, that at any time after the passage of this Act, all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing shall be filed in the Department of the Interior, and such consolidated companies shall thereafter proceed to construct said railroad and branches and telegraph line, upon the terms and conditions provided in this Act.

It is obvious that this authorized the consolidation of the five companies above named only, or of any two or more of them, and that such consolidation was intended to be immediate, as is evidenced by the words "and such consolidated company shall thereafter proceed to construct said railroad." The Act of 1862 gave no authority, therefore, for any consolidation with the Denver Pacific nor for any consolidation between the five railways after their completion. The purpose of the consolidation was to ensure the "construction of said railroad," and if that was completed before the consolidation was effected the intent and purpose of the consolidation and all authority therefor alike failed.

The Act of July 2d, 1864, called itself "amendatory," and its title is "An Act to amend an Act entitled 'An Act to aid, etc., approved July 1st, 1862.'" This being so, the amendatory Act falls within the rule thus enunciated in the *Sinking Fund Cases* (99 *U. S.*, 757):

"The two acts are to be read together; they deal with the same subject and are to be treated as if passed at the same time."

The Act of 1864 was moreover especially construed to be an amendment of the Act of 1862 and to control the inter-

pretation of the latter by the Supreme Court in the case of *Railway Co.* v. *Prescott* (16 *Wall.*, 683), and therefore the question is not open for discussion.

The railways mentioned in this Act of 1864 are as follows: "The Union Pacific," "The Central Pacific of California," "The Leavenworth, Pawnee and Western, now known as the Union Pacific, Eastern Division," "The Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the State of Iowa." These are three of the railways which were specified in the Act of 1862. The Iowa corporation was new.

The Denver Pacific not being mentioned in this Act cannot lawfully claim to have had any rights or powers conferred upon it thereby. Its power to consolidate with the Union Pacific and the Kansas Pacific is, however, attempted to be justified by the Acts of Congress of March 3d, 1869, and June 20th, 1874. A careful reading of those Acts shows not only that the Denver Pacific was not authorized to consolidate with the Kansas Pacific but that by the first named Act such consolidation was absolutely forbidden.

The Title of the Act of 1869 is as follows:

"An Act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway and the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado."

The first section authorized the Union Pacific Railway Company, Eastern Division, to contract with the Denver Pacific for the construction, operation and maintenance of that part of its line of railroad between Denver and its point of connection with the Union Pacific, and which point is directed to be at Cheyenne, and to adopt the road-bed or grade of the Denver Pacific and to grant to the Denver Pacific the perpetual use of its right of way and depot grounds.

The second section, which is supposed to support the the consolidation of the Kansas Pacific with the Denver Pacific, contains this provision:

"And all provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line without discrimination shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division."

This provision did not at all refer to either the 16th section of the Act of Congress of 1862 or the 16th section of the Act of 1864, but it did refer to Section 15 of the Act of July 2d, 1864, and to that section alone, which provides as follows:

"And be it enacted that the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads for all purposes of communication, travel and transportation so far as the public and the Government are concerned as one continuous line, and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time and transportation without any discrimination of any kind in favor of the road or business of any of the said companies."

It was to these "provisions of law" and to none other that the Act of March 3d, 1869, referred.

There is, therefore, nothing in the pretense that the Denver Pacific was authorized by this language to avail itself of the rights and privileges as to consolidation conferred by the Acts of Congress of 1862 and 1864.

But a further provision of the Act of 1869 absolutely forbade the consolidation of the Kansas Pacific with the Denver Pacific. The last paragraph of Section 2 of the Act of 1869 is in these words.

"But nothing herein shall authorize the said Division Company"—*i. e.*, the Kansas Pacific Company—"to operate the road or fix the rates of tariff for the Denver Pacific Railway Company."

This was an intentional and absolute inhibition against the operation of the Denver Pacific Road by the Kansas Pacific Company, to whom the property of the former had been given "perpetually," and if such operation in a direct and open manner was forbidden by the statute, it follows

that such operation in an indirect and covert manner by means of an alleged consolidation was equally forbidden.

The attempted consolidation, therefore, of the Denver Pacific with the Kansas Pacific was without authority of law, so far as the Act of 1869 is concerned, and forms no element in determining the question of the present citizenship, obligations and duties of the Kansas Pacific Company.

There is nothing in the Act of 1874 (18 *Stats.*, 111*) which repeals the inhibition contained in the Act of 1869, or exhibits any intent so to do. The Act of March 3, 1869 (15 *Stats.*, 324), asserts that the Denver Pacific is a corporation existing under the laws of the Territory of Colorado. The Act of 1874 relates to the railway only of such incorporation, and not to the company itself. It does not purport to authorize the company to do anything. It expressly refrains from authorizing it to avail itself of sections 16 of the Acts of 1862 and 1864. Moreover, the word "company" is defined in the Act of 1862 (*Sec.* 15) as excluding the railway proper, for it says such word shall "embrace their associates, successors and assigns." The Act of 1874 recognizes on its face the Act of 1839, and provides only that for all the purposes of the said Act and of the said Acts of 1862 and 1864, the railway of the Denver Pacific to Cheyenne should be taken to be a part and extension of the Kansas Pacific road. The Act is limited, therefore, to the railway and road of the two companies, and does not purport to enlarge the powers of either corporation. Its practical effect was to give a right to the Government to require the Denver Pacific to apply five per cent. of its net earnings on account of the Kansas Pacific's indebtedness to the Government.* This was the only object intended to be accomplished by making the "railway" of the Denver Pacific "a part and extension" of the "road" of the Kansas Pacific.

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* See appendix.

The Act of 1874, therefore, left the inhibition in the Act of 1869 in force; and thus the consolidation was still prevented. If, however, the Act of 1874 can be so construed as to work a repeal of the Act of 1869, even then the consolidation of the Denver Pacific with the Kansas Pacific would be subordinated, were it within the State, to the rights of the State of Kansas, because the Act of 1874 makes additions to the 15th section of the Act of 1864, and that Act expressly recognized the sovereignty of the State.

The enquiry now returns as to the consolidation of the Kansas Pacific with the Union Pacific. That is attempted to be further justified by the provisions of Section 16 of the Act of July 2, 1864. So much of that section as is pertinent to the enquiry is in these words:

"*And be it further enacted*, That any two or more of the companies authorized to participate in the benefits of this Act are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this Act, or the laws of the State or States in which the road of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the Government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed; and be subject to the same terms, conditions, restrictions and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. * * * And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization."

It is obvious that the consolidation authorized by this section was intended to be immediate. This is evidenced first by the general language of the section, which shows that the land grants and the bonds thereafter to be issued

were to be received by the consolidated company, and, secondly, by the particular phraseology ;

"in case any company authorized thereto shall not enter into such consolidated organization, such company upon the completion of its road as hereinbefore provided shall be entitled to and is hereby authorized to continue and extend the same," &c.

The Act of 1862 therefore gave no authority for any consolidation between the Union Pacific and the Kansas Pacific after the completion of the roads. The same purpose of consolidation was intended by the Act of 1864 as was expressed in the Act of 1862, viz. : "the construction of said railroad," and if that was completed before the consolidation was effected, the intent and purpose of the consolidation and all authority therefor alike failed.

It is plain from the language of section 16 of the Act of 1864, that Congress did not intend to invade the domain of the State of Kansas, or to interfere with its sovereignty or to override its laws. No argument could state the absence of this intent more directly than Congress has itself stated it in the language of the 16th section of the Act of 1864. It says :

"Any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations as the same may or shall be * * * * in such manner as they may agree upon and as shall not be incompatible with this act, or the laws of the State or States in which the roads of such companies may be."

This adopted the legislation of the States as it existed at any time when such consolidation was sought to be effected, and made any federal consolidation subordinate to the laws of the State in which the roads of such companies might be.

STATUTES ARE TO BE CONSTRUED SO AS TO HARMONIZE ALL THEIR PARTS.

The great fundamental rule in construing statutes is that every part of a statute must be viewed in connection with the whole so as to make all the parts harmonize if practicable, and give a sensible and intelligible effect to each. It is not to be presumed that the legislature meant that any part of a statute should be without meaning or without force and effect (*Ogden* v. *Strong*, 2 *Paine's C. C. R.*, 584; 12 *U. S. Dig.*, 1*st Series*, 740, § 802).

Applying this rule and it follows of necessity that the acknowledgment of the sovereignty of the State so explicitly stated in section 16 of the Act of 1864 is to be imported into and read as a portion of section 16 of the Act of 1862; and in so doing both sections are harmonized, effect is given to both statutes, and the sovereignty of the State is preserved. Certainly such sovereignty will not be overthrown by implication merely. If the two statutes are construed as one, and the two sections are harmonized in the manner suggested, then it is evident that Congress intended that the Kansas Pacific Company should consolidate with the Union Pacific Company only when such consolidation was not incompatible with the laws of the State of Kansas. Congress thus left to those laws their supremacy, and thus left the Kansas Pacific Railway Company amenable thereto.

But, in view of the rule above enunciated that all parts of a statute are to be given their full meaning and are to be so construed as to harmonize with each other, there is further, and, if possible, more conclusive evidence, in the Act of Congress of 1862 that Congress did not intend to interfere with the sovereignty of the State, or to withdraw the railroads in that Act mentioned from their allegiance to the State, or from their obligation to obey its laws.

The defendant relies upon the provisions of Section 16 of the Act of 1862 as above quoted, and as being unamended and uncontrolled by the Act of 1864.

There is another provision of the Act of 1862 to which which the defendant does not call attention and which is decisive upon the question now involved.

Before proceeding to consider it, it is necessary to state another proposition and that is—

"TO UNITE" AND "TO CONSOLIDATE" ARE SYNONYMOUS AND CONVERTIBLE TERMS.

That this is so is shown not only etymologically but by the very Acts of Congress relied upon and by the acts of the defendant.

The root of "unite" is *unus*. It means "to join" or "to make one."

"Consolidate" is "to make solid" or to "unite," and may be illustrated by the National motto the union under which typifies the consolidation of the railways. It makes a harmonious working whole without destroying the identity of the parts united.

This synonymy is established, so far as the State of Kansas is concerned, by the obsolete Act of 1862, which provided that

"Any railroad company under the laws of Kansas may by vote of a majority of the stock unite or consolidate with any other company."

The 16th section of the Act of Congress of July 2, 1864, uses these words:

"Any two or more companies are hereby authorized to unite and consolidate their organizations."

The alleged articles of consolidation set up by the defendants are entitled "articles of union and consolidation," and state a follows:

"Whereas in the aforesaid legislation of congress applicable to the above mentioned three railroad companies it is provided that they may unite and

consolidate their respective organizations, * * and whereas each of said companies have resolved to unite and consolidate their organizations, * * now this agreement of union and consolidation witnesseth * * that * * do hereby agree to unite and consolidate, and do hereby unite, form and consolidate."

As has been said, the Act of 1862 first mentions the Union Pacific Railroad Company and it then specifies the Leavenworth, Pawnee and Western Railroad Company of Kansas, the Central Pacific Railroad Company of California, the Hannibal and St. Joseph Railroad Company of Missouri and the Pacific Railroad Company of Missouri—thus making five companies which are specified in the Act.

All the powers which were conferred by Sections 16 of the Acts of Congress of July, 1862, and July, 1864, are previously expressed in the Act of 1862, and being so there expressed, Sections 16 of the Acts of 1862 and 1864 are to be construed so as to harmonize with the previous provisions. There is no difficulty in doing this so far as Section 16 of the Act of 1864 is concerned, for it is upon its face in perfect harmony with the previous provision of the Act of 1882. By an application of the rule above mentioned requiring the Court to harmonize all the parts of a statute, the provisions of Section 16 of the Act of 1862 are to be read so as to harmonize with the provisions of the previous Section 10 of the same Act. That section gives the same right to unite and consolidate the several roads mentioned in the Act of 1862, as did the 16th section of that Act. The provisions of the said 10th section are as follows :

" And the Hannibal and St. Joseph Railroad, the Pacific Railroad of Missouri and the first named company "—*i. e.*, the Union Pacific Railroad Company—" or either of them, on filing their assent to this Act as aforesaid, may unite upon equal terms under this Act with the said Kansas Company in constructing said railroad to said meridian of longitude with the consent of the said State of Kansas."

Therefore the Act of 1862, construed in view of the rule above mentioned and harmonizing Section 10 with Section 16, expresses upon its face the intent of Congress to recog-

nize the sovereignty of the State of Kansas, and not to authorize the consolidation of the Kansas Pacific Railway Company unless such consolidation was with the consent of the State of Kansas, which consent was not in existence in 1880 when the articles of union and consolidation were signed, save as evidenced by the Act of the State of 1870. The force of this argument cannot be repelled by the suggestion that the "union" of the railways intended by Section 10, was a physical "uniting" of the tracts, because the roads were not then built, and as then planned were to be parallel, and not converging, and therefore such a "union" was as physically impossible then as it is at the present day; and because such suggestion ignores and eliminates the words "may unite upon equal terms under this Act in constructing said," *i. e.*, the Kansas Railroad and Telegraph specified in Section 9, "with the consent of the said State of Kansas," which words can have no sensible interpretation unless they refer to a "union" of the companies as such.

It follows, therefore, that the Acts of 1862 and 1864 both recognized the sovereignty of the State, and do not constitute a shield for the consolidation set up by the defendant, and which, it is alleged, withdraws it absolutely from the domain and the jurisdiction of the State.

The assertion that Congress has authorized or sanctioned such withdrawal would seem to be not only wilful but a pretense.

The Kansas Pacific Railway Company still remains, therefore, as stated in the Act of 1862,

"A company chartered by the State of Kansas,"

and, as such, it is a citizen of the State, and therefore this Court has no jurisdiction over it in this suit.

THE STATE OF KANSAS NEVER AUTHORIZED THE KANSAS PACIFIC COMPANY TO ALIENATE ITS FRANCHISE OTHERWISE THAN BY MORTGAGE.

By the 8th Article of the alleged consolidation, the Kansas Pacific purports to convey all its rights, privileges and franchises to the new company. Aside from the State Act of 1870, which the defendant repudiates, such transfer under the State Statutes, and the authorities hereinbefore cited, could not lawfully be made. The 16th section Act of 1862 did not authorize such a transfer but a consolidation only, which, if effected, would leave the franchises and privileges of each company as its own separate property (*County* v. *Conners*, 3 *Sup. Ct. Rep.*, 69), with all the responsibility attaching thereto.

The 16th section of the Act of 1864 expressly limits the right to consolidate upon such terms and conditions as they may agree upon, "to such terms and conditions as are not incompatible with the laws of the State." The State law of 1870 expressly defined the terms and conditions under and upon which alone the State gave its assent to a railway consolidation. Such terms and conditions, so far as the same are relevant to this question, were, that one of the railways should be in an adjoining State; that it should be organized and exist under the laws of that State; that it should connect at the Kansas State line with a Kansas railway, and that it should form therewith a continuous line of railroad. A consolidation, therefore, which disregarded and was in violation of all these terms and conditions was a consolidation which was "incompatible"—that is, "legally inconsistent" with the laws of the State, and it cannot therefore be relied upon as justifying the attempted alienation to the new company of the rights, privileges and franchises of the Kansas Pacific Company.

THE OFFENSIVE PURPOSE OF THE CONSOLIDATION.

It is very evident from the articles of consolidation that the union of the companies thereunder was not intended to affect the financial condition of the stockholders, or the rights or financial position of creditors. The stockholders simply surrendered their old stock, and received its precise equivalent in the stock of the new company. The rights and positions of creditors were left undisturbed by this provision:

"The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies, whose several and separate existence as to third parties shall, as respects such debts, obligations and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation."

And yet, notwithstanding this emphatic assertion of the continued "several and separate existence" of the three companies, the Kansas Pacific is said to have been so absorbed in the new company, as to be no longer justiciable by the State in its own forum, for the purpose of vindicating its own laws.

There was some other reason, therefore, apart from a pretence of benefiting either shareholders or creditors, for effecting the consolidation. What such reason was, and that it had a purpose most offensive to the dignity and sovereignty of the State, is shown by the language of the first article:

"And the said consolidated company *assumes to and for itself* all of the provisions of said acts of Congress, * * * including the power to sue and be sued in all Courts of law and equity within the United States, whether Federal or State, and the right of corporations organized under a law of the United States to remove causes from State to Federal Courts; and all of the provisions of the aforementioned acts of Congress and each of them, so far as in their nature applicable to the company hereby formed, shall apply thereto; it being the intent of the parties hereto and of these articles of union and consolidation to organize the company hereby formed under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company as fully as if the same were incorporated herein at large."

The plain and only interpretation of this is, that the sole and only purpose of the consolidation was to enable each of the companies to avail themselves of the provisions in the Act of March 3d, 1875, authorizing the removal of causes from the State to the Federal Courts. No other object was to be accomplished, no other purpose was intended. Paraphrased, the declaration is: "We will no longer be amenable to the jurisdiction of the State of Kansas. No longer shall its citizens have a right to prosecute their suits against us in the tribunals of the State. No longer shall our allegiance to the State or to its laws be due. We will treat the State, its jurisdiction, its laws, its tribunals and its citizens, all with defiance. We will *assume to constitute ourselves* a Federal corporation. We will alienate and remove ourselves from the jurisdiction of the State; we will have our only legal residence in a foreign State, and we will confer upon ourselves the right to remove 'any suit of a civil nature in law or in equity,' which may be brought against us in the State Courts, into the Federal Courts, and thus defy the citizens and the State of Kansas."

It is right and fitting that an intent and purpose so offensive, and so unlawfully attempted to be effectuated, should here, at the threshold, receive a swift and peremptory condemnation.

The motion to remand should be granted.

December, 1883.

W. A. JOHNSTON,
Attorney-General.
A. A. HARRIS.

CLARENCE A. SEWARD,
W. H. ROSSINGTON,
G. S. GREEN,
Of Counsel for the State.

APPENDIX.

An Act supplemental to an Act entitled, "An Act to incorporate the Leavenworth, Pawnee and Western Railroad Company."

Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas, as follows:

SECTION 1. The provisions of an Act entitled "An Act to incorporate the Leavenworth, Pawnee and Western Railroad Company," shall be and the same are hereby so extended as to enable said company to commence and progress with, at any time within nine years from the date of the passage of this Act, the construction of a railroad to be called the "Southern Branch & Gulf Railroad," beginning at some favorable point on the Leavenworth, Pawnee & Western Railroad, and following the most practicable route southwardly to terminate on the southern boundary of the Territory of Kansas, at some point where an easy connection may be had with a line of railroad extending through the Indian Territory and State of Texas to the Gulf of Mexico, under the same provisions, privileges, rights, and restrictions as provided in the Act to which this Act is a supplement; and for such purpose the said company may increase their capital stock to ten millions of dollars, or any other amount necessary for the completion of the said road.

SEC. 2. The said company shall have, hold and enjoy the free right and privilege of keeping and maintaining a public ferry across the Missouri River, at the point or terminus of said road on said river; and also across other streams on the line of said road, where the said company may deem such ferry preferable to a bridge, or until such time as said company can procure bridges.

SEC. 3. The said company shall have power and authority at any time within nine years from the passage of this Act, to commence and continue the construction of a branch or branches of said road from any point on said road to any point on the southern or western boundary of the Territory; and also to construct a branch from any point on the said road to any point on the northern boundary of the Territory of Kansas, with all the privileges, powers and rights granted to said company by the Act to which this is a supplement, and subject to all the restrictions and provisions of said Act.

This Act to take effect and be in force from and after its passage. Approved, February 23, 1857.

An Act making additions to the fifteenth section of the Act approved July 2, 1864, entitled an "Act to amend an Act entitled, 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1, 1862.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that * * * * and it is hereby provided that for all the purposes of said Act, and of the Acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the Act of March third, eighteen hundred and sixty-nine. Approved June 20, 1874.

In the annual report of the Auditor of Railroad Accounts for the year 1878 occurs the following explanation of the foregoing Act of 1874:

"On June 20, 1874, the Act of Congress (18 U. S. Stat. at L., p. 11) was approved, by which the officers and agents of the companies authorized to construct the Pacific railroads under the acts of July 1, 1862, and July 2, 1864, who refuse to operate and use the roads under their control as one continuous line, without any discrimination of any kind, are deemed guilty of a misdemeanor and liable to fine and imprisonment. It is also provided in the act—

That for all the purposes of said act (that of July 1, 1862), and the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the Act of March third, eighteen hundred and sixty-nine.

This act is still in force, and seems to require the Denver Pacific Railway Company to apply five per cent. of their net earnings on the account of the Kansas Pacific Railway Company's indebtedness to the government."

111-449

FILED
FEB 23 1884
M. McKENNEY, Clerk.

Supreme Court of the United States.

October Term, 1883.

THE STATE OF KANSAS

vs.

THE KANSAS PACIFIC RAILWAY CO.

ADDENDUM TO BRIEF FOR THE RAILWAY CO.

Supreme Court of the United States.

October Term, 1883.

THE STATE OF KANSAS

vs.

THE KANSAS PACIFIC RAILWAY CO.

ADDENDUM TO BRIEF FOR THE RAILWAY CO.

Summary of defendant's contention, that under the 16th section of the Acts of Congress of July 2, 1864, and July 1, 1862, coupled with the Acts of the State of Kansas, referred to herein and in the record, a consolidation, in all respects legal and effectual, was had of the several corporations named in the Articles of Consolidation, and that the petition of the State of Kansas, which denies the validity of that consolidation, and the answer thereto, constitute a case arising under the laws of the United States.

In presenting this summary, all reference to defendant's other contention, that the Acts of Congress referred to did, before any consolidation, constitute the Kansas Pacific Railway a corporation of the United States, is omitted, being left to stand on the arguments already submitted on that point. Nor will the point, already so fully discussed, as to whether Quo Warranto by a State can, under the laws of Kansas, or under any circumstances, present a case arising under the laws of the United States, be referred to. Attention will be asked merely to the question: What is the true effect of the Acts of Congress construed in connection with the laws of the State of Kansas?

I.

It is to be noted that the above contention of defendant is confined to the question whether, *so far as the alleged consolidation relates to the Kansas Pacific Railway only*, that consolidation is valid. The legislation of the States and Territories in which the other corporations authorized to be consolidated are situated, is contained in statutes not embraced by this record. No step is shown to have been taken by the State from which the Denver Pacific Railway derives its charter to

disaffirm the legality of the consolidation, and it must therefore be assumed that such consolidation was not "incompatible" with the laws of that State.

II.

The 16th section of the Act of Congress of July 2, 1864, provides: "That any two or more of the companies authorized to participate in "the benefits of this Act are hereby authorized *at any time* to unite "and consolidate their organizations, as the same may or shall be, upon "such terms and conditions, and in such manner, as they may agree "upon, and as shall not be incompatible with this Act or the laws of "the State or States in which the roads of such companies may be."

1. Now, the first inquiry which this legislation invites is, as to what is meant by incompatibility with the laws of the States. Is it an incompatibility with any and all of the general laws of the State, or does it mean incompatibility with such laws of the State, which in addition to, or it may be in disregard of, those general laws governing its corporations, authorize the consolidation of such corporations, and thus, in effect, obliterate the constructive limitation of the powers which would otherwise result from their charters, or from the general laws which might be held to define their powers? That the latter is the true construction is obvious when the terms are scrutinized; since incompatibility refers and is confined *to "the terms and conditions" of such consolidations*, which it previously authorizes. The right to confer the power of consolidation is distinctly assumed by Congress in this section, and also distinctly in the 16th section of the Act of July 1, 1862. Whether Congress has the power, which it thus professed to exercise, to authorize such consolidation without the assent of the State, is of itself a Federal question which lies in the path of the cause; but it will, as shown in the sequel, become, we think, an unimportant inquiry, if that assent be, as we contend, established.

2. The next inquiry is: What was the condition of the legislation of Kansas on the subject of the consolidation of its railways when the Acts of Congress referred to were passed? It had passed on the 25th of February, 1862 (Record, p. 50, Exhibit D), an Act expressly and distinctly applicable to "any other company *which may be hereafter organized under the laws of the United States*," and designating specially by its proviso what subsequently became the Union Pacific Railroad Company, and authorizing the consolidation of its railways therewith, which consolidation was to "hold, use and enjoy all the rights and privileges conferred by the laws of the State of Kansas on the company or

companies so uniting," and this Act, it is prescribed, *shall take effect at once;* and *the Secretary of State was directed to "cause it to be published immediately after its passage."*

3. In this condition of the legislation of Kansas, it is submitted: That the 16th section of the Act of Congress of July 2, 1864, was framed in accordance with and to meet and adopt that legislation. That this must be deemed to have been done not only with the assent but at the request of the State, or, as this Court declares in 9th Wall., p. 592, "by the active interposition of the State Legislature," so that, whether, as to the other companies named in the Act of Congress, they were to be subjected to future legislation, as to consolidation, by the States incorporating them or not (a question that can only be settled by reference to their then respective laws as to consolidation), yet as to the Kansas Pacific the existing law was adopted by Congress.

It would be a strange construction to hold that, in the face of this legislation of Kansas, Congress meant to leave its policy of consolidation open to be annihilated by the further and future legislation of that State.

4. The Acts and Resolves of the State of Kansas subsequent to the Acts of Congress creating the Union Pacific Railroad Company, passed in full view of those Acts and of the provisions thereof for consolidation, are to be found in the Record (p. 57, Ex. N; p. 58, Ex. O; p. 59, Ex. P; pp. 60 and 62, Ex. Q. & N). They contain no dissent from those provisions, and, within the doctrine of this Court in the "sinking fund cases" (99 U. S. R., pp. 727, 728), they would of themselves be deemed an implied assent thereto.

III.

Thus far the contention of defendant has rested on the ground that the Acts of Congress authorizing consolidation were based upon and did incorporate the existing laws of Kansas in that respect, and that Kansas has repeatedly, since the passage of those Acts, acquiesced in and ratified the same.

But, assuming that this construction of the Acts of Congress could be successfully assailed, we proceed to review the legislation of Kansas since the Act of March 5, 1862 (Record, p. 50), to show, not only that the consolidation as accomplished by the Articles bearing date January 24, 1880 (Record, p. 11), was "*compatible with the laws of the State*" on the subject of consolidation at that date, but further, that at that period

the Act of March 5, 1862, remained in full force and unrepealed, and in all respects applicable to, and its provisions applied in, the consolidation thus effected.

To support this proposition, we therefore submit a review of the legislation of Kansas.

Prior to the Act of March 5, 1862 (on the repeal or non-repeal of which this question turns), there was no general law of Kansas for the organization of corporations of any character, an Act for that purpose passed in 1855, being deemed what have been called the "bogus statutes" of that State, and subsequently repealed (see preface to the General Statutes of 1868). The Supreme Court of the State, in 11th Kansas Reports, p. 442, gives a list of all the general laws of the State for the voluntary organization of corporations, and the Act of 1855 is not among them. All the powers, therefore, of corporations, up to 1862, depended upon their respective charters.

1. On March 5, 1862, the Act in question was passed, and is found in the Record, p. 50. As the repeal of this Act is the question in hand, it is fit at the outset to note that its provisions are distinctly divisible. It purports to confer on the corporations of the State, by a vote of the majority of its stockholders, the power to consolidate *inter se* and with corporations of other States, without any limitation as to form or time, or, indeed, any restrictions whatever. Thus far it is a general statute. But it also authorizes a distinct consolidation with what became the Union Pacific Railroad Company, and for this consolidation it prescribes distinct conditions, — among others, the right to run upon equal terms through cars, the right to connect with said Pacific railroads at such points as may be determined by those branches (that is to say, by the State companies); and with those branches shall share equally in the proceeds of any lands that may be granted by Congress. The Act, therefore, is general as to the consolidation of State railroads *inter se* or with the roads of other States, but special as to consolidation with the Union Pacific Railroad Company.

2. On February 13, 1865, was passed a general act *confined to railroad companies*, entitled, "An Act to provide for the incorporation and regulation of railroad companies," a copy of which is hereto annexed, marked "Exhibit A."

The 22d section of that Act provides for the consolidation of such railroads of the State "*as shall form a continuous or connected line*" with any other railroad. It prescribes the number of directors and other details inapplicable to the consolidation with the Union Pacific

Railroad Company as provided in the Acts of Congress. It contains no repeal of any antecedent legislation, is not *in pari materia* with the Act of 1862, so far as that Act relates to the Union Pacific Railroad, and, as will appear hereafter, by distinct recognition of the State left the Act of 1862 unrepealed.

3. Next came the Act which went into effect March 6, 1866 (Session Laws of Kansas, 1866, p. 124), entitled "An Act to provide for the organization and regulation of incorporated companies in the State of Kansas." Among the corporations thus authorized to be organized, there are "railroads and street railroads." By its 11th section, p. 128, it provides as follows:—

"Section 11. Any company heretofore organized and now existing under any special or general law of the Territory or the State of Kansas (which was the position of the Kansas Pacific Railway Company) may, by a vote of its board of directors, accept any or all of the provisions of this Act," etc., "and have and exercise all the rights, powers and privileges conferred by this Act, by filing a copy of their acceptance with the Secretary of State."

Now, although railroad companies were embraced by this Act, *no provisions for their consolidation were contained in it*, nor does it repeal the Act of 1862, nor the Act of 1865, containing such provisions. Its final section (47, p. 137) enumerates each and all of the previous Acts of the Legislature, which it declares are thereby repealed; but neither the Act of 1862 nor that of 1865 is among them. Thus, in effect, the Act impliedly declares (and for the obvious purpose that railroads organized under it should have the powers conferred by those Acts) that the Acts of 1862 and 1865 are in full force.

4. Two years afterwards, the compilation called the "General Statutes of 1868" was passed, and these General Statutes, the plaintiff's briefs declare, rendered the Acts of 1862 "*obsolete;*" by which must be intended, probably, that it was repealed by implication.

There is some difficulty, looking to the various provisions of those General Laws, to find what is intended to be embraced by them. By the Act of February, 1867, appointing Commissioners to report these laws, their duty, it would seem, was declared to be the compilation of all the laws of a general nature of the State. The enacting clause of these General Statutes, p. 1123, is as follows:—

"Section 1. The following Acts of the Legislature shall constitute the General Statutes of Kansas, to wit:—

"All Acts revised by the commissioners appointed to revise the

"General Laws of this State, and reported to and enacted by the Legis-
"lature at the present session; all other Acts of a general nature
"enacted at the present session and the following-named Acts, or so
"much or such part thereof as may be and remain in force at the time
"of the passage of this Act, to wit": —

The obscurity which results from this section is the impossibility to ascertain what the Commissioners deemed "laws of a general nature," and still further what were the Acts "revised by the Commissioners." But it is clear that the Act of 1862 was not revised, nor considered an Act of a general nature, since in no one of the provisions of this compilation are the general powers of consolidation of railroad corporations embraced or alluded to, nor, what is more material, are the special provisions of the Act of 1862 as to the consolidation with the Union Pacific Railroad Company in any way referred to therein. After the State had thus repeatedly evinced its policy to authorize the consolidation of its railroads, the compilers of these statutes omit all reference to the subject; and, if this omission be construed as a declaration that the laws authorizing such consolidation were among those intended to be revised, and thus constituted a repeal of the Act of 1862, and of the 22d section of the Act of 1865, then the railroads of the State were, by a mere implication, stripped of all future powers to effect such consolidations.

But the question of the repeal of the Act of 1862 does not rest alone on the grounds already stated, viz., that the Commissioners did not deem it a statute of a general nature, since by the section of the chapter enacting these general statutes (p. 1127) it is declared what are to be deemed repealed by that statute, which section is as follows: —

"Section 2. All other Acts of a general nature, embodied or
"re-enacted in whole or in part in any of the statutes hereinbefore
"enumerated, or repugnant thereto, are hereby repealed." This is the repealing clause to be found in these statutes.

Now, it is clear that the Act of 1862, as we have already shown, is not embodied or re-enacted in whole or in part by these general statutes. Neither it nor any of its provisions are in any manner embodied or referred to therein, and consequently it must be deemed exempted from the Acts thus declared to be repealed.

IV.

It remains to find, although it be true that these general statutes did not repeal the Act of 1862, yet whether there be not, in the subsequent legislation of the State, some Act which can be deemed to have that effect.

The Act of 1870 (chap. 92, p. 195, Laws of Kansas of 1869-70, Record, p. 54) has been referred to in the briefs of the plaintiff, not as constituting a repeal of the Act of 1862, but as one which does not embrace consolidations with corporations of the United States, and also as being in its details wholly inapplicable to any such consolidation; so that the defendants are in plaintiff's view excluded from any pretence that the consolidation actually effected was in conformity to this statute.

If plaintiff's view is correct, it shows that the Act of 1862 is not impliedly repealed by the Act of 1870. The Act of 1870 will be found, we think, upon comparison with the 22d section of the Act of 1865, to be a revision of that section with superadded qualifications, restrictions, and conditions deemed requisite for the public interest. Possibly, so far as its provisions are in conflict with the 22d section of the Act of 1865, it may be held as an implied repeal of that Act; but it would be an extraordinary construction to hold that it repeals by implication the specific provisions of the Act of 1862 authorizing the consolidation with the Union Pacific Railroad Company. It makes no express repeal.

The doctrine of this Court on the subject of implied repeal may be found in

McCool *v.* Smith, 1st Black. 450;
U. S. *v.* Tyner, 11 Wall. 89;
U. S. *v.* Walker, 22 How. 299.

See also:

Thorpe *v.* Adams, L. R., 6 Com. Pl. 125, 135;
People, etc., *v.* Davenport, etc., 91 N. Y. 588, (1883);
Sedgwick on Stat. and Const. Law, 87.

V.

The foregoing contention of the defendant, limited as it is to the single question, whether the consolidation, as effected, is legal and valid (and omitting as it does the other grounds of defence which, with the Federal questions they raise, are fully presented in the briefs), depends for its support on the proper construction of Acts of Congress, namely, the Acts of 1862 and 1864, which construction is controverted by the plaintiff.

1. The claim of the defendant is, that, neither by Section 16 of the Act of 1862 (Record, p. 74), nor Section 16 of the Act of 1864 (Record, p. 84), is any reference had to, nor are the same based upon, the consent of the State of Kansas as a requisite for the consolidation authorized by these sections, and that such legislation by Congress is valid without such consent.

2. Defendant further claims, that although the consolidation thus authorized by the Act of 1864 is required *as to its terms* to be compatible with the laws of Kansas, yet that such compatibility is limited to compatibllity with the laws of Kansas governing consolidations, and not compatibility with the general laws of the State, which, when by State legislation consolidations are authorized, are to be deemed modified or abrogated or inapplicable to the extent to which they are inconsistent with such consolidation.

3. Defendants claim that by the true interpretation of the 16th Section of the Act of 1864, construed in reference to the special legislation of Kansas in 1862, in regard to a consolidation, with what afterwards became the Union Pacific Railroad Company, such legislation must be deemed to have been accepted and acted upon by Congress in framing the Act of 1864.

4. And, further, if the last asserted construction shall not prevail, then defendant claims that, by just construction of the Act of 1864 (16th Section), the compatibility with the law of the State is to be deemed *compatibility with the laws of the State as to consolidation of its corporations with the Union Pacific Railroad*, that the Act of the State of Kansas, 1862, was such, and, as long as it remained unrepealed, must be deemed to be the law of the State with which future consolidation with the Union Pacific Railroad Company must be made compatible, and thus the consolidation which actually took place, while it remained unrepealed and in conformity to it, is valid.

It is clear that each and all of the foregoing interpretations of the Acts of 1862 and 1864 are controverted by defendants, since otherwise there would seem to be nothing open for argument.

Apparently, the brief of the plaintiff draws into controversy the constitutionality and construction of other laws of the United States, and, if so, they will doubtless not escape the attention of the Court.

S. BARTLETT,

Of Counsel for Defendant.

EXHIBIT A.

CHAPTER XLIV.

INCORPORATION OF RAILROADS.

AN ACT to provide for the Incorporation and Regulation of Railroad Companies.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That any number of persons, not less than nine, associating for the purpose of constructing a railroad, shall subscribe a statement which shall specify as follows: First, the name assumed by such company, and by which it shall be known. Second, the name and place of residence of each of the persons forming the association. Third, the name of the place or places of the termini of said road. Fourth, the proposed amount of capital stock of said company, which shall not be less than five thousand dollars per mile of said railroad. Such statement, verified by the affidavit of three or more of the persons therein named, shall be acknowledged before some one authorized to take the acknowledgment of deeds, and filed in the office of the Secretary of State, to be by him recorded in a book kept for that purpose, and a copy thereof, duly certified by the Secretary of State, shall be evidence of the existence of such company.

SEC. 2. That when such certificate shall have been filed and recorded as aforesaid, the persons named as corporators therein are hereby authorized to carry into effect the objects named in said certificates, in accordance with the provisions of this act; and they and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate, with succession, with powers to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, and the same to alter at pleasure, and to do all acts necessary to carry into effect the objects for which said company was created, and such company shall possess all the powers and be subject to all rules, liabilities, and restrictions provided by this act: *Provided*, that any corporation or corporations formed and organized or consolidated under the provisions of this act, exercising or attempting to exercise any banking powers under any pretense whatever, or the business of broker or brokerage, shall forfeit their right of incorporation and consolidation under or by virtue of this act.

SEC. 3. Any corporation formed in pursuance of this act shall be and is hereby authorized to construct and maintain a railroad with single or double track, with such side-tracks, turnouts, offices and depots as it may deem necessary between the points named in the certificate, commencing at or within and extending to or into any town, city or village along the line of said road, or named as the place of the termini of such road, and construct branches from the main line to other towns or places within the limits of any county through which said road may pass.

SEC. 4. The capital stock of such company shall be divided into shares of one hundred dollars each, and consist of such sums as may be named in the certificate; such shares shall be regarded as personal property, and shall be subject to execution at law.

SEC. 5. An installment of two per cent. on each share of stock shall be payable at the time of making the subscription, and the residue thereof shall be paid in such installments, and at such times and places and to such persons, as may be required by the directors of such companies.

SEC. 6. If any installment of stock shall remain unpaid for sixty days after the time it may be required, whether such stock is held by an assignee, transferee, or the original subscriber, the same may be collected by civil action, or the directors may sell the stock so unpaid at public auction, for the installment then due thereon, first giving thirty days' public notice of the time and place of sale in some newspaper in general circulation in the county where such delinquent stockholder resided at the time of making such subscription or becoming such assignee or transferee, or in the county of his actual residence at the time of making such assignment or transfer, or if such stockholder reside out of the State, or his residence shall be unknown, such publication shall be made in the county where the principal office of the company is located; and if any residue of money shall remain after paying the amount due on said stock, the same shall, on demand, be paid over to the owner. If the whole of said installment be not paid by such sale, the remainder shall be recoverable by a civil action against the subscriber, assignee or transferee.

SEC. 7. That, whenever any railroad company heretofore incorporated, or created and incorporated under the provisions of this act, shall, in the opinion of the directors thereof, require an increased amount of capital stock, they shall, if authorized by the holders of a majority of the stock, file with the Secretary of State a certificate, setting forth the amount of desired increase, which shall not exceed fifty

thousand dollars per mile of said railroad, and thereafter such company shall be entitled to have such increased capital as is fixed by such certificate.

SEC. 8. That the persons named in said certificate of incorporation, or a majority of them, shall, within three months after the filing of said certificate, cause books to be opened for receiving subscriptions to the capital stock of said company, at such time or times and at such place or places as they may determine, after having given at least thirty days' notice in a newspaper published or generally circulated in one or more counties where books of subscription are to be opened, of the time and place of opening books, which books shall be kept open till the whole amount of capital stock is subscribed; and, so soon as ten per centum of the capital stock shall be subscribed, they shall give like notice for the stockholders to meet, at such time and place as they may designate, for the purpose of choosing eleven directors from the stockholders of the company, who shall continue in office until the time fixed for the annual election, and until their successors are chosen and qualified. At the time and place appointed, directors shall be chosen by ballot, by such of the stockholders as shall attend for that purpose, either in person or by lawful proxies. Each share shall entitle the owner to one vote, and a majority of votes shall be necessary for a choice; but no person shall vote at any election of directors on any share on which any installment is due or unpaid. The persons named in such certificate, or such of them as may be present, shall be inspectors of election, and shall certify what persons are elected directors, and appoint the time and place of holding the first meeting. A majority of said directors shall form a board, and be competent to fill vacancies in their board, and [to] transact all business of the corporation. An annual election shall be held for directors, at such time and place as the stockholders, at their first meeting, shall determine, or as the by-laws of the corporation may require; and the directors chosen at any election shall, so soon thereafter as may be convenient, choose one of their number president, and shall appoint a secretary and treasurer of the corporation. The directors, before entering on their duties, shall each take an oath or affirmation faithfully to discharge his duties; and they shall, from time to time, make such dividends of the profits of said company as they may think proper.

SEC. 9. The stock of any railroad company created under this act shall be transferable only on the books of said company; and no person shall, at any election, be entitled to vote on any stocks of any such company unless the same shall have been standing, in the name of the

SEC. 18. Every company organized under this act shall be required to erect, at all points where their road shall cross any public road, at a sufficient elevation from such public road to admit of the free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad and warn persons of the necessity of looking out for the cars; and any company neglecting or refusing to erect such sign shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal.

SEC. 19. That whenever any railroad company now existing, or which may hereafter organize under this act, shall deem it necessary to extend their line of road across any navigable waters of this State, it shall be lawful, and they are hereby granted, full power to construct such bridge or bridges as may be required for the purpose of said road, across such navigable waters, and to repair and maintain the same in such manner as may best subserve the interest of such company: *Provided*, that such bridge shall not be constructed in a manner to obstruct or impede in any wise the free navigation of said waters, and *Provided*, that nothing herein contained shall be construed as violative of the laws of the United States in respect to the navigable waters therein.

SEC. 20. Any railroad corporation may extend its road, with the consent of the stockholders holding two-thirds of the capital stock of the company, and for that purpose, may increase its capital as provided in this act, and the directors for that purpose shall open books of subscription to such increased stock upon the same condition as the original stock, and when subscribed, the same shall become a part of the capital stock of said company, and the president of said company shall make a certificate under his hand and the seal of said company, which shall state the length of said extension as near as may be, the point from and to which the same is to be made, and the estimated cost of such extension, and file the same with the Secretary of State, who shall record the same in his office, and a copy thereof, duly certified by the Secretary of State, under the seal of the State, shall be evidence of the extension of such railroad, and such extension shall be a part of the said railroad.

SEC. 21. That every railroad company in this State shall cause all its trains of cars for passengers to stop, upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains, at least one minute, and shall also cause all its trains of cars to entirely stop not more than sixty rods and not less than ten rods

before each arrival at the crossing of any other railroad; and every company, and every person in the employment of such company, that shall violate, or cause or permit to be violated, the provisions of this section, shall be liable to a forfeiture of not more than one hundred dollars, nor less than twenty dollars, to be recovered in a civil action before any justice of the peace of the county in which such violation shall occur, upon the complaint of any person, to go to the use of common schools in the county; and such company shall be further liable in the full amount of damages done to property or persons, in consequence of any neglect on the part of its agents or employees to comply with the requirements of this section, and in all cases in which the forfeiture shall occur under the provisions of this section, the company whose agents shall cause or permit such violation shall be liable for the amount of such forfeiture.

SEC. 22. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into single corporation, in the manner following: First, any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the names and places of residence and number of the directors thereof, which shall not exceed nineteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, which shall not be less than one hundred dollars, the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation, the manner of compensating stockholders in each of said two or more corporations who refuse to convert their stock into the stock of such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this act: *Provided*, that all the stockholders in either of such corporations, who shall refuse to convert their stock into the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they shall so require previous to said consolidation being consummated. Second, such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations

person so claiming to vote on said stocks, upon the books of said company, at least thirty days prior to such election.

SEC. 10. Such corporation is authorized to enter upon any land, for the purpose of examining and surveying its railroad line, and may appropriate thereof as may be deemed necessary for its railroads, including necessary side-tracks, depots and work-shops, and water stations, material for construction, except timber, a right of way over adjacent lands sufficient to enable such companies to construct and repair its roads, and a right to conduct water by aqueducts, and the right of making proper drains; but no appropriations of private property to the use of any corporation provided for in this act, shall be made until full compensation therefor be first made, in money, or first secured by deposit of money, to the owner or owners, irrespective of any benefit from any improvement proposed by such corporation, or in such manner as is or may be prescribed by law.

SEC. 11. That whenever any railroad company heretofore incorporated, or which may hereafter be incorporated, shall find it necessary, for the purpose of avoiding annoyance, public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or for other reasonable causes, to change the location or grade of any portion of their road, whether heretofore made or hereafter to be made, such railroad companies shall be and are hereafter authorized to make such changes of grade and location, not departing from the general route prescribed in the certificate of such company; and for the purpose of making any such change in the location and grade of any such road as aforesaid, such company shall have all the rights, powers, and privileges to enter upon and take and appropriate such lands, and make surveys necessary to effect such changes and grades, upon the same terms, and be subject to the same obligations, rules, and regulations as are or shall be prescribed by law, and shall also be liable in damages, when any have been caused by such changes, to the owner or owners of the lands upon which said road was heretofore constructed, to be ascertained and paid or deposited as aforesaid; but no damages shall be allowed unless claimed within ninety days after actual notice of such intended change shall be given to such owner or owners, if residing on the premises, or notice [by] publication for four successive weeks, in some newspaper in general circulation in the county, if non-residents.

SEC. 12. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind or any part thereof, it shall be competent for the municipal

or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals, by the ninth section of this act. But no railroad company shall be entitled, under the provisions of this act, to build any street railroad in any incorporated town or city, without the consent of the authorities thereof and of the citizens of such city, expressed by a majority at some general election.

SEC. 13. Such corporation may demand and receive for the transportation of passengers on said road such reasonable rates as may be from time to time prescribed by law.

SEC. 14. Such companies shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, in sums not less than one hundred dollars; and to secure the payment thereof, may pledge the property and the income of such company.

SEC. 15. Such company may acquire, by purchase or gift, any land in the vicinity of such road, or through which the same may pass, so far as may be deemed convenient or necessary by said company to secure the right of way, or such as may be granted to aid in the construction of such roads, and the same to hold or convey in such manner as the directors may prescribe; and all deeds and conveyances made by such company shall be signed by the President, under the seal of the corporation; and any existing railroad corporation may accept the provisions of this act, and after such acceptance all conflicting provisions of their respective charters shall be null and void.

SEC. 16. It shall be lawful for such corporation, whenever it may be necessary in the construction of such road to cross any road or stream of water, to direct the same from its present location or bed; but such corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness.

SEC. 17. Such corporation shall, as soon as convenient after its organization, establish a principal office, at some point on the line or at the terminus of its road, and may change the same at pleasure, giving public notice, in some newspaper published in the county where the said principal office is located, of such establishment or change.

SEC. 18. Every company organized under this act shall be required to erect, at all points where their road shall cross any public road, at a sufficient elevation from such public road to admit of the free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad and warn persons of the necessity of looking out for the cars; and any company neglecting or refusing to erect such sign shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal.

SEC. 19. That whenever any railroad company now existing, or which may hereafter organize under this act, shall deem it necessary to extend their line of road across any navigable waters of this State, it shall be lawful, and they are hereby granted, full power to construct such bridge or bridges as may be required for the purpose of said road, across such navigable waters, and to repair and maintain the same in such manner as may best subserve the interest of such company: *Provided*, that such bridge shall not be constructed in a manner to obstruct or impede in any wise the free navigation of said waters, and *Provided*, that nothing herein contained shall be construed as violative of the laws of the United States in respect to the navigable waters therein.

SEC. 20. Any railroad corporation may extend its road, with the consent of the stockholders holding two-thirds of the capital stock of the company, and for that purpose, may increase its capital as provided in this act, and the directors for that purpose shall open books of subscription to such increased stock upon the same condition as the original stock, and when subscribed, the same shall become a part of the capital stock of said company, and the president of said company shall make a certificate under his hand and the seal of said company, which shall state the length of said extension as near as may be, the point from and to which the same is to be made, and the estimated cost of such extension, and file the same with the Secretary of State, who shall record the same in his office, and a copy thereof, duly certified by the Secretary of State, under the seal of the State, shall be evidence of the extension of such railroad, and such extension shall be a part of the said railroad.

SEC. 21. That every railroad company in this State shall cause all its trains of cars for passengers to stop, upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains, at least one minute, and shall also cause all its trains of cars to entirely stop not more than sixty rods and not less than ten rods

before each arrival at the crossing of any other railroad; and every company, and every person in the employment of such company, that shall violate, or cause or permit to be violated, the provisions of this section, shall be liable to a forfeiture of not more than one hundred dollars, nor less than twenty dollars, to be recovered in a civil action before any justice of the peace of the county in which such violation shall occur, upon the complaint of any person, to go to the use of common schools in the county; and such company shall be further liable in the full amount of damages done to property or persons, in consequence of any neglect on the part of its agents or employees to comply with the requirements of this section, and in all cases in which the forfeiture shall occur under the provisions of this section, the company whose agents shall cause or permit such violation shall be liable for the amount of such forfeiture.

SEC. 22. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into single corporation, in the manner following: First, any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the names and places of residence and number of the directors thereof, which shall not exceed nineteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, which shall not be less than one hundred dollars, the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation, the manner of compensating stockholders in each of said two or more corporations who refuse to convert their stock into the stock of such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this act: *Provided*, that all the stockholders in either of such corporations, who shall refuse to convert their stock into the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they shall so require previous to said consolidation being consummated. Second, such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations

until after it has been submitted to the stockholders of each of said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty days, specifying the time and place of such meeting and the object thereof, to be addressed to each of said stockholders, when their place of residence is known, and deposited in the post office, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal office of business, and has been sanctioned by such stockholders by a vote of at least two-thirds [of the] amount of the stock represented at such meeting, either in person or by proxy, voting by ballot in regard to such agreement, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders, separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations.

SEC. 23. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate thereof in the office of the Secretary of State, the said two or more corporations, mentioned or referred to in the first section of this act, shall be merged in the new corporation provided for in the agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein.

SEC. 24. Upon the election of the first board of directors of the corporation created by the agreement in the twentieth section of this act mentioned, and by the provisions of this act, all and singular, the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular, the rights and interests in and to every species of property, real, personal, and mixed, and things in action, shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of every and all other rights of property, in the same manner and to the same extent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporation; and the titles and real estate, acquired by either of said two or more [corporations], shall not be deemed to revert or be impaired by means of anything in this act contained: *Provided*, that all rights of creditors and all liens upon the property of either of said corporations, parties to said agreement, shall be and are hereby preserved unimpaired; and the respective corporations shall continue to

exist so far as may be necessary to enforce the same; and *Provided further*, that all the debts, liabilities and duties of either company shall thenceforth attach to such new corporation and be enforced from the same, to the same extent and in the same manner, as if such debts, liabilities and duties had been originally incurred by it.

SEC. 25. Any railroad company, heretofore or hereafter incorporated, may, at any time, and by means of subscription to the capital [stock] of any other company, or otherwise, aid such company in a construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing said aid, or any railroad company, organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company; and if said company's lines of railroad are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the object for which they were created: *Provided*, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto.

SEC. 26. All acts of a general nature relating to railroad corporations, and relating to the condemnation and appropriation of lands, and not inconsistent with this act, shall be applicable to corporations created under this act.

SEC. 27. Every company, organized under this act, shall commence construction of its railroad within one year after filing its articles of association with the Secretary of State; and in default thereof, said corporation shall become and be dissolved.

SEC. 28. This act shall take effect and be in force from and after its publication once in the Topeka State Record.

Approved February 18, 1865.

S. J. CRAWFORD,

Governor.

111-449

IN THE

Supreme Court of the United States.

The Kansas Pacific Railway Company,
Plaintiff in Error.

vs.

The State of Kansas,
Defendant in Error.

F. L. Ames, et al.,
Plaintiff in Error.

vs.

The State of Kansas.
Defendant in Error.

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Attorney-General,
For the State of Kansas.

CLARENCE A. SEWARD,
W. H. ROSSINGTON,
GEO. S. GREEN,
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Defendant in Error.

ADDITIONAL AND SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF KANSAS.

Very elaborate briefs have been prepared by the distinguished gentlemen with whom I have the honor to be associated in these cases, in which the questions which arise have been discussed with great learning and consummate ability.

The cases however are of transcendent importance to the people of Kansas, and hence I trust that I may be pardoned for one or two additional suggestions.

1. I assume that the Kansas Pacific Railway Company was and is a Kansas corporation. That is to say, that as an intangi-

ble, invisible thing, it existed and exists only by virtue of some act or acts upon the part of the State of Kansas in its sovereign character as such.

In *McCulloch vs. Maryland*, Chief Justice Marshall said: "The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to objects committed to the other." I am therefore fully justified in speaking of the State of Kansas as *sovereign*.

2. It follows then, that if the Kansas Pacific Railway Company is a Kansas corporation, that only the sovereignty which created it can inquire whether or not it has misused or non-used its franchises to the extent that such franchises should be taken from it. This proposition our adversaries will probably readily admit. At any rate it cannot be successfully controverted.

3. What then is the logical deduction?

I shall attempt to maintain that the sovereignty which created this corporation can never be compelled to litigate with it in the courts of another sovereignty, when that litigation involves the question of the rightful existence of the corporation.

Does not this proposition prove itself? If not, why not?

According to that fiction which declares that a corporation is a citizen of the State by virtue of whose laws it is incorporated, the Kansas Pacific Company became, and was and is a citizen of Kansas.

Kansas declares that the Company has violated its laws. It is seeking to vindicate those laws and punish the violator thereof. And, I may add, the State is seeking to do this by virtue of proceedings instituted in its court of last resort. Who shall say then that those proceedings shall be arrested, and that any court

of another sovereignty, much less an inferior court thereof, shall stay the righteous judgment of the highest court of this *sovereign* State?

The question is as to a violation of the laws of the State of Kansas. What tribunal so competent to determine this question as that one, which by its constitution and laws has been made their supreme expounder?

I do not evade the question; I meet it squarely; I declare that no warrant can be found for the declaration that any Federal court has the power to declare forfeited the franchises of a State corporation.

A *sovereign* who could be compelled to go into the courts of another sovereignty to punish one of its citizens for a violation of its own laws would be a *dependent*.

The State of Kansas says to this Company, you are my creature, I made you, you owe your existence to me, you have violated my laws, I will punish you for so doing, I will proceed against you in my highest and most august tribunal. But the Company says not so, you shall be forced to litigate with me in the forum of another sovereignty, where if you are not an alien you are at least a stranger. If this can be done, where can be found the sovereignty of which Chief Justice Marshall said the States were possessed?

The consequences of such a doctrine are too far reaching to contemplate. The Union was not formed that the States should be destroyed, but that they might live.

It will not be denied that in the matter of the creation of corporations the States are at least as sovereign as the United States. But certainly no one would contend that a State court has jurisdiction to forfeit the charter of a Federal corporation.

In *State vs. Curtis*, 35 Conn., 874, it was held that a State court has no jurisdiction in *quo warranto* to try the right of directors to office in a national bank.

In *State vs. Bowen*, 8 South Carolina, 400, the same doctrine

was announced as to presidential electors. Why, I ask, are these decisions right. Plainly because these were matters of purely Federal cognizance. An attempt was made in the court of one sovereignty to limit or determine the right of a party to hold office under the laws of another.

I need not refer this court to the many cases in which it has been held that the jurisdiction of the United States Circuit Court is limited, and that the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears.

Where is the clause of the Federal constitution which directly, or by implication, confers such jurisdiction as is contemplated in those cases?

It is not sufficient that jurisdiction may be inferred, it *must* clearly appear.

In the case of *Murdock vs. Woodson*, Governor, 2 Dillon, 204, Judge Dillon uses this language: "In the case before us the State of Missouri is asserting simply the right of a creditor or lien-holder, and not any right in her *sovereign* character." Clearly the implication is that if the State had been acting in her *sovereign* character,then the Federal court would not have had jurisdiction.

If the jurisdiction or the Federal court can be sustained in these cases, then we have the absurdity of a power in one government to pull down what another has built up, and a right in one government to destroy what there is a right in another to preserve.

The Federal constitution clearly ordains that a State in its *sovereign* capacity cannot be sued. How then, when it sues in its *sovereign* capacity, shall its suit be arrested?

The State of Kansas gave life to the Kansas Pacific Company. The State only can determine whether it shall die.

In attempting to argue this question, I have not relied on adjudicated cases. These seem, in fact, to be wanting; mainly, I am persuaded, because heretofore no one has been bold enough to assert the doctrine contended for on the other side.

I have necessarily adverted to what I believe to be the fundamental, underlying principles of our system of government. I know full well that every member of this court is familiar with these principles; but, when they are attacked, I can only repel the assault with the weapons used during all the years of our existence.

I cheerfully yield a paramount allegiance to the government of the Union, but I claim for the States such rights as are clearly theirs.

A. A. HARRIS,
Fort Scott, Kansas.

Supreme Court of the United States.

The State of Kansas,

Defendant in Error,

vs.

The Kansas Pacific Railway Company,

Plaintiff in Error.

The State of Kansas,

Defendant in Error,

vs.

F. L. Ames et al.,

Plaintiffs in Error.

BRIEF

FOR THE STATE,

UPON

THE FEDERAL CONSTITUTION AND STATUTES.

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NEW YORK:

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1884.

Supreme Court of the United States.

THE STATE OF KANSAS,
Defendant in Error,

vs.

THE KANSAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

THE STATE OF KANSAS,
Defendant in Error,

vs.

F. L. AMES et al.,
Plaintiffs in Error.

BRIEF FOR THE STATE ON WRITS OF ERROR BROUGHT TO REVIEW THE ORDERS OF THE CIRCUIT COURT REMANDING THE SUITS TO THE STATE COURT.

The State of Kansas commenced the first above-entitled suit in one of its own Courts against the plaintiff in error as a corporation of the State. The plaintiff in error answered, averring that, by virtue of certain proceedings alleged to have been authorized by the Acts of Congress of July 1st, 1862, and July 2d, 1864, it had become consolidated into the Union Pacific Railway Company and had thereby be-

come a Federal corporation. It thereupon filed its petition and bond in the State Court and claimed thereby to have removed the suit into the Circuit Court of the United States.

The State of Kansas commenced the second above-entitled suit in one of its own Courts against the plaintiffs in error, alleging that they were "calling themselves the board of directors of the Union Pacific Railway Company" and as such were assuming to exercise the privileges, liberties and franchises which of right appertained to the Kansas Pacific Railway Company, and demanding by what warrant they claimed to have, use and enjoy such privileges, liberties and franchises.

In the answer in the second above-entitled suit it is alleged that one of the plaintiffs in error is a citizen of Utah (*Darst* v. *Peoria*, 13 *Fed. Rep.*, 564). The other plaintiffs in error claimed to be citizens of States other than the State of Kansas, and admitted that they composed the board of directors of the Union Pacific Railway Company. All the plaintiffs in error made the same averment with regard to the consolidation of the Kansas Pacific Railway Company into the Union Pacific Railway Company, and filed their petition and bond for removal into the Circuit Court of the United States.

It is assumed that the right of removal in the suits is claimed under Section 640 of the Revised Statutes, or under the provisions of the Act of 1875, or under both, as the bonds and petitions are framed in conformity with both statutes.

A motion was made in the Circuit Court to remand the causes to the State Court. Such motion was granted, and from the order so granting the same a writ of error was brought in each case to this Court.

The defendant in error submits the case upon two Briefs

—this one upon the Federal Constitution and statutes, and the other upon the facts and principles of general law.

The Position of the State.

The State of Kansas in its relation to the Federal Union stands upon the same plane as the original States.

This position was guaranteed to the State by the Act (12 *U. S. States*, 126), admitting it in these words:

> "That the State of Kansas shall be and is hereby declared to be one of the United States of America and admitted into the Union on an equal footing with the original States in all respects whatever."

Whatever, therefore, the original States could properly claim, Kansas may with equal propriety assert.

Before there was any confederation, before there was any Union, and therefore, before there was any constitution, the States were superbly unassailable. As sovereigns they were not amenable to judicial process. They were not justiciable in any forum.

A hundred years have passed away and this Court is still on the threshold of the discussion of the questions: How much of their sovereignty did the States surrender? In what tribunal did they consent and agree to be justiciable? This latter question which seems, as *Story* says (*on Const.* § 1705), "to remain to this hour without any authoritative decision," is germane and relevant to the cases now presented.

In answering these inquiries we are not to be guided by the lights of the present day, which are those of Federal consequence and of a centralizing tendency, but by the lights of the past which existed at the origin of the Union, and which were afforded by the several States acting as separate and individual sovereigns.

The understanding upon which the assenting votes of thirteen independent States were solicited and procured

in favor of the adoption of the Constitution, is if possible, to be ascertained. If ascertained, it is to be regarded as controlling now. The interpretation which was given at the time by those who were striving to convert an inchoate and imperfect agreement into a permanent constitution, is the interpretation which ought to prevail to-day.

To ascertain precisely what such interpretation was requires a consideration of the position of the States before the Constitution, and the recalling of the publicly announced views of those who prepared, discussed and adopted that instrument as a perpetual agreement between themselves.

The Origin of the Federal Judicial Power and the Genesis of the Federal Courts.

The Continental Congress composed of its fifty-five delegates, was sitting in 1775 in Carpenters' Hall, Philadelphia. His Majesty's ships of war were capturing the Colonial vessels, destroying sea-port towns, especially Falmouth (now Portland), and driving hundreds of helpless colonists from their homes. Some measure of retaliation became necessary, and to supply it the Congress on the 25th of November, 1775, passed (1 *Jour. Cong. p.* 254) these resolutions:

"*Whereas* it appears from undoubted information, that many vessels which had cleared at the respective custom-houses in these colonies, agreeable to the regulations established by Acts of the British Parliament, have, in a lawless manner, without even the semblance of just authority, been seized by his Majesty's ships of war, and carried into the harbour of Boston and other ports, where they have been rifled of their cargoes, by order of his Majesty's naval and military officers, there commanding, without the said vessels having been proceeded against by any form of trial, and without the charge of having offended against any law.

And whereas orders have been issued in his Majesty's name, to the commanders of his ships of war, to proceed as in the case of actual rebellion against such of the seaport towns and places being accessible to the king's ships, in which any troops shall be raised or military works erected, under

color of which said orders, the commanders of his Majesty's said ships of war have already burned and destroyed the flourishing and populous town of Falmouth, and have fired upon and much injured several other towns within the United Colonies, and dispersed at a late season of the year hundreds of helpless women and children, with a savage hope, that those may perish under the approaching rigours of the season, who may chance to escape destruction from fire and sword, a mode of warfare long exploded amongst civilized nations.

And whereas the good people of these colonies, sensibly affected by the destruction of their property and other unprovoked injuries, have at last determined to prevent, as much as possible, a repetition thereof, and to procure some reparation for the same, by fitting out armed vessels and ships of force. In the execution of which commendable designs it is possible, that those who have not been instrumental in the unwarrantable violences above mentioned may suffer, unless some laws be made to regulate, *and tribunals erected competent to determine the propriety of captures.* Therefore resolved—

1. That all such ships of war, frigates, sloops, cutters, and armed vessels as are or shall be employed in the present cruel and unjust war, against the United Colonies, and shall fall into the hands of, or be taken by, the inhabitants thereof, be seized and forfeited to and for the purposes hereinafter mentioned.

2. *Resolved*, That all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, military or naval stores of what kind soever, and all vessels to whomsover belonging, that shall be employed in carrying provisions or other necessaries to the British army or armies, or navy, that now are, or shall hereafter be within any of the United Colonies, or any goods, wares, or merchandize for the use of such fleet or army, shall be liable to seizure, and with their cargoes shall be confiscated.

3. That no master or commander of any vessel shall be entitled to cruize for or make prize of any vessel or cargo, before he shall have obtained a commission from the Congress, [or from such person or persons as shall be for that purpose appointed, in some one of the United Colonies.

4. *That it be, and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect Courts of Justice, or give jurisdiction to the Courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury under such qualifications, as to the respective legislatures shall be expedient.*

5. That all prosecutions shall be commenced *in the Court of that Colony*, in which the captures shall be made, but if no such Court be at that time erected in the said Colony, or if the capture be made on open sea, then the prosecution shall be *in the Court of such Colony* as the captor may find most convenient: provided that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any Colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbor of the the same.

6. *That in all cases an appeal shall be allowed to the Congress*, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be

lodged with the Secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the Secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof.

7. That when any vessel or vessels shall be fitted out, at the expense of any private person or persons, then the captures made, shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the United Colonies, then one-third of the prize taken shall be to the use of the captors, and the remaining two thirds to the use of the said Colony, and where the vessels so employed, shall be fitted out at the continental charge, then one-third shall go to the captors, and the remaining two-thirds, to the use of the United Colonies; provided nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one-half of the value, and the remainder shall go to the Colony or Continent as the case may be, the necessary charges of condemnation of all prizes being deducted before distribution made."

Under these resolutions the enemy's property captured upon the high seas was brought within the domain of the federal judicial power, and it was so brought as federal subject-matter. The Courts of the several States were constituted Courts of Prize in first instance and from their decisions an appeal "was allowed to the Congress." This was the first exercise of federal appellate power and in its exercise by Congress is the origin of the appellate judicial power of the Supreme Court of the United States.

Under these resolutions privateers and State and federal cruisers made many captures which were adjudicated by the Prize Courts of New Hampshire, Pennsylvania, Virginia, Rhode Island, Georgia, South Carolina, New Jersey and Delaware, and from such adjudications appeals were taken to the Congress.*

Pending these proceedings, and on the 15th of November, 1777, the delegates prepared "Certain Articles of Confederation and Perpetual Union," and the same were ratified by the States on the 9th of July, 1778.

These Articles provided, among other things, as follows:

* Appendix.

"Act 2. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled.*

Act 9. § 1. The United States in Congress assembled shall have the sole and exclusive right * * of sending and receiving ambassadors * * * of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by the land or naval forces in the service of the United States shall be divided or appropriated * * of appointing courts for the trial of piracies and felonies committed on the high-seas, and of establishing courts for receiving and determining finally appeals in all cases of captures.

§ 2. The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other case whatever.

§ 3. All controversies concerning the private right of soil claimed under different grants of two or more States whose jurisdictions as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States."

It is evident therefore under these articles—

1st. That the federal judicial power was extended to all cases of capture of the enemy's property on land or water and the division and appropriation of the prizes, to the appointing of Courts for the trial of piracies and felonies committed on the high seas, and to establishing Courts for receiving and determing final appeals in all cases of capture.

The appeals from the State Courts as Courts of Prize in first instance which had been provided for in the resolutions of the 25th of November, 1775, and which were again authorized by the Articles of Confederation, were originally heard in Congress by a special committee of five in each case. A Standing Committee of five was then appointed, three of whom were constituted a quorum; and finally on January 15th, 1780, they were all referred to a duly consti-

*This was substantially reënacted as the ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

tuted court authorized by the Confederate Congress and called "The Court of Appeals in Cases of Capture." (*The Ship Resolution*, 2 *Dall.*, 124). This is again an illustration of the appellate power of the Supreme Court of the United States in "all cases of admiralty and maritime jurisdiction."

2d. That the States under the Articles of Confederation retained their sovereignty and every power not expressly delegated to the United States in Congress assembled.

3d. That the Congress was constituted the last resort on appeal in all disputes and differences then subsisting, or that thereafter might arise between two or more States concerning boundaries, jurisdiction or any other cause whatever. This provision made every dispute and difference between the States, no matter from what cause it might arise, federal subject-matter, and it constituted the Congress as the last resort on appeal in all such cases. The appeal provided for was not, however, an appeal in a technical sense from a a previous judgment, for there was no Court then existing which had jurisdiction of any controversy between the States. It was an appeal by one party or the other from an unsuccessful attempt between the political sovereignties constituting the States to settle amicably their own differences. All the proceedings provided for the initiation and prosecution of an appeal show that the jurisdiction of the Congress was an original jurisdiction in the first instance, and was to be invoked by either party by presenting a petition stating its grievance and praying for the constitution of a tribunal by which such difference was to be adjudicated and settled. This was the origin of the original jurisdiction of the Supreme Court of the United States. Under these provisions there came before the Congress as a court of original jurisdiction disputes and differences rela-

tive to boundaries between the three States of New Hampshire, Massachusetts-Bay and New York, between the commonwealth of Pennsylvania and the State of Connecticut, between the commonwealth of Massachusetts and the State of New York, and between the States of South Carolina and Georgia. The mode of procedure from the initiation to the close of the controversy is shown in the extracts from the *Journal of Congress* contained in the Appendix.

4th. That the agreement between the States was that they should be justicable only in the highest then existing federal tribunal, *viz.*, "the Congress assembled." They did not then agree to become justiciable in any other forum. So far as the States were concerned they agreed that every possible cause of action in which they were interested should be for the purposes of the original jurisdiction of Congress federal subject-matter.

SOVEREIGN GRANTS ARE NOT TO BE ENLARGED BY INTENDMENT.

In *Wiggins* v. *East St. Louis* (107 *U. S.*, 371) the Court said:

> "It is a rule of interpretation that every grant from the sovereign authority is, in case of ambiguity, to be construed strictly against the grantee and in favor of the Government (*Charles River Bridge* v. *Warren Bridge*, 11 *Peters*, 420; *Mills* v. *St. Clair*, 8 *How.*, 569; *Attorney-General* v. *Boston*, 123 *Mass.*, 460)."

The States were the only "sovereign authority" from which the "grant" of Federal judicial power proceeded. Their assent to the exercise of this grant adversely to themselves is not under this rule of interpretation to be inferred. It must be proved to inhere in the language of the Constitution as the States understood it at the time of its adoption by them, or it cannot be proved to exist at all.

The Invitation to the States "To form a more Perfect Union."

The practical working of the Articles of Confederation did not produce the result anticipated—notably in the deficiency of Federal power. The delegates to the Federal Congress, therefore, especially Mr. Madison and Mr. Hamilton, sought to secure the assent of the States to an enlargement of the area of Federal power and jurisdiction, and their efforts took the form of a circular letter drafted by Mr. Hamilton, and assented to by the others, and addressed to the States, and which contained, among other things these suggestions:

"That there are important defects in the system of Federal Government is acknowledged by the acts of all those States which have concurred in the present meeting; that the defects, upon a closer examination, may be found greater and more numerous than even these acts imply, is at least so far probable from the embarrassments which characterize the present state of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion in some mode which will unite the sentiments and counsels of all the States. In the choice of the mode, your Commissioners are of opinion that a convention of deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations which will occur without being particularized. Your Commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future convention with more enlarged powers is founded, as it would be a useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are, however, of a nature so serious as, in the view of your Commissioners, to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the Confederacy."

The Legislature of Virginia was the first to act upon this communication, and it appointed commissioners, as suggested, by a law which contained, among other things, this preamble:

"And whereas, the same noble and extended policy, and the same fraternal and affectionate sentiments which originally determined the citizens of this

commonwealth to unite with their brethren of the other States in establishing a federal government, cannot but be felt with equal force now as motives to lay aside every inferior consideration, and to concur in such further concessions and provisions as may be necessary to secure the great objects for which that government was instituted, and to render the United States as happy in peace as they have been glorious in war."—(5 *Ell. Deb.*, 116, 117.)

The States accepted the invitation and the result was the Philadelphia convention.

The Mutations in the Convention of Article III. vesting and defining the Judicial Power of the United States.

At the meeting of the Constitutional Convention on the 29th of May, 1787, Mr. Randolph is stated to have opened the main business and to have proposed as conformable to his ideas the following resolution:

"Resolved, that a National Judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made; so as to affect the persons actually in office at the time of such increase or diminution.

That the jurisdiction of the inferior tribunal shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas; captures from an enemy, cases in which foreigners or citizens of other States, applying to such jurisdiction, may be interested; or which respect the collection of the national revenue; impeachments of any national officers and questions which may involve the national peace and harmony."—(*Mad Papers, Vol. 2, pp. 733, 734.*)

Mr. Pinckney laid before the House his plan of a Federal Constitution as follows:

"The Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity and admiralty, as shall be necessary. The judges of the courts shall hold their offices during good behaviour; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment, affecting ambassadors, and other public ministers, this jurisdiction shall be *original;* and in all other cases *appellate.* All criminal offences, except in

cases of impeachment, shall be tried in the State where they shall be committed. The trials shall be open and public, and shall be by jury."—(*Mad. Papers, Vol.* 2, *p* 743.)

On the 15th of June, 1787, Mr. Patterson laid before the Convention his plan, as follows:

"Resolved, that a Federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the Executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and, by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue; that none of the judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for———thereafter."—(*Mad. Papers, Vol.* 2, *p.* 865.)

Mr. Hamilton, to whom more than to any other one person the United States are indebted for the framework and the adoption of the Constitution, had two plans with reference to the jurisdiction of the Supreme Court. His original proposition (*Works of Hamilton, Vol.* 2, *p.* 394) was in these words:

"VII.—This Court to have *original* jurisdiction in all causes of capture, and an *appellate* jurisdiction from the Courts of the several States in all cases in which the revenues of the General Government or the citizens of foreign nations are concerned."

This original plan was intended to perpetuate the judicial system as it obtained under the articles of confederation in relation to captures on land and water; the division and appropriation of prizes; the establishment of Courts for the trial of piracies and felonies committed on the high seas; and of Courts for receiving and determining finally appeals in all cases of capture. It was obviously Mr. Hamilton's original intention to give the Supreme Court of the United States, as the Court of highest judicial dignity,

and therefore as more nearly approaching the plane of the former Congress, original and by which he meant exclusive jurisdiction in all cases of capture, and to leave to the State courts original jurisdiction in all the other specified cases.

The plan proposed to the convention modified this purpose by providing for the institution of Federal Courts in each State, with jurisdiction over such matters as it had originally been intended to confide to the State Courts alone, and apparently leaving the jurisdiction of the State Courts thereover to be concurrently exercised with the Federal Courts, and was in these words:

"The supreme judicial authority to be vested in judges, to hold their offices during good behaviour, with adequate and permanent salaries. This court to have *original* jurisdiction in all causes of capture and an *appellative* jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations are concerned. The Legislature of the United States to have power to institute courts in each State for the determination of all matters of general concern."—(*Mad. Papers, Vol.* 2, *p.* 891, 892.)

The discussion of the various plans proposed was adjourned into the Committee of the Whole, and on the 18th of July the following entry was made in the record:

"The thirteenth Resolution, 'The jurisdiction of the national judiciary, &c.,' being then taken up, several criticisms having been made on the definition, it was proposed by Mr. Madison so to alter it as to read thus: 'That the jurisdiction shall extend to all cases arising under the national laws; and to such other questions as may involve the national peace and harmony,' which was agreed to *nem. con.*"—(*Mad. Papers, Vol.* 2, *p.* 1137.)

On the 26th of July, 1787, all the Resolutions pending before the Committee of the Whole were referred to a Committee on Detail, including Resolutions 14, 15 and 16, as follows:

"14. Resolved. That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the National Legislature; to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made so as to affect the persons actually in office at the time of such diminution.

15. Resolved, That the National Legislature be empowered to appoint inferior tribunals.

16. Resolved, that the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the General Legislature, and to such other questions as involve the national peace and harmony."—(*Mad. Papers, Vol.* 2, *p.* 1224.)

On the 6th of August, 1787, the Committee on Detail reported as follows:

"SEC. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts, as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

SEC. 2. The Judges of the Supreme Court, and of the inferior courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SEC. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies betweeen two or more States (except such as shall regard territory or jurisdiction); between a State and citizens of another State; between citizens of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, this jurisdiction shall be *original*. In all the other cases before mentioned it shall be *appellate*, with such exceptions and under such regulations as the Legislature shall make.

SEC. 4. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such inferior courts, as it shall constitute from time to time.

SEC. 5. The trial of all criminal offenses (except in cases of impeachment) shall be in the State where they shall be committed, and shall be by jury. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States. But the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment according to law."—(*Mad. Papers, Vol.* 2, *p.* 1238.)

The Report of the Committee on Detail coming on to be debated, the following entry was made in the record:

"Section 3 being taken up, the following clause was postponed, viz.: 'to the trial of impeachments of officers of the United States'; by which the jurisdiction of the Supreme Court was extended to such cases. Mr. Madison and Mr. Gouverneur Morris moved to insert, after the word 'controversies,' the words 'to which the United States shall be a party;' which was agreed to, *nem. con.* Doctor Johnson moved to insert the words, 'this Constitution and the,' before

the word 'laws.' Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department. The motion of Dr. Johnson was agreed to, *nem. con.*, it being generally supposed, that the jurisdiction given was constructively limited to cases of a judiciary nature. On motion of Mr. Rutledge the words 'passed by the Legislature,' were struck out; and after the words 'United States,' were inserted, *nem. con.*, the words, 'and treaties made, or which shall be made under their authority,' conformably to a preceding amendment in another place. The clause 'in cases of impeachment,' was postponed. Mr. Gouverneur Morris wished to know what was meant by the words: 'In all the cases before mentioned, it [jurisdiction] shall be appellate, with such exceptions, &c.,'—whether it extended to matters of fact as well as law—and to cases of common law, as well as civil law. Mr. Wilson: The Committee, he believed, meant facts as well as law, and common as well a civil law. The jurisdiction of the Federal Court of Appeals had, he said, been so construed. Mr. Dickinson moved to add, after the word 'appellate,' the words 'both as to law and fact'; which was agreed to *nem. con.* Mr. Madison and Mr. Gouverneur Morris moved to strike out the beginning of the third section, 'The jurisdiction of the Supreme Court,' and to insert the words, 'the judicial power,' which was agreed to *nem. con.* The following motion was disagreed to, to wit, to insert 'In all the other cases before mentioned, the judicial power shall be exercised in such manner as the Legislature shall direct.' Delaware, Virginia, aye—2; New Hampshire, Connecticut, Pennsylvania, Maryland, South Carolina, Georgia, no—6. On a question for *striking out* the last sentence of the third [fourth] section, 'The Legislature may assign, &c.,' it passed *nem. con.* Mr. Sherman moved to insert, after the words 'between citizens of different States,' the words, 'between citizens of the same State, claiming lands under grants of different States,'—according to the provision in the 9th Article of the Confederation; which was agreed to *nem. con.*" —(*Mad. Papers, Vol. 2, p.* 1438.) * *

This *resumé* shows that the dignity of the State and Federal subject-matter were alike considered, and that the original purpose and intention of making the State justiciable in the highest tribunal only was adhered to.

All the Resolutions and Amendments were then referred to a Committee on Style, which reported on the 12th of September, 1787, as follows:

Sec. 1. "The judicial power of the United States, both in law and equity, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour; and shall at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Sec. 2. The judicial power shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. To all cases affecting ambassadors, other public ministers and consuls. To all cases of admiralty and maritime jurisdiction. To controversies to which the United States shall be a party. To controversies between two or more States; between a State, and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction.

In all the other cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."—(*Mad. Papers, Vol.* 3, *p.* 1556.)

This report is identical with the Constitution with the following exceptions:

1. In the first clause the words after the words "United States," "both in law and equity," have disappeared.

2. In the first line of the second section the word "both" has been striken out.

3. In the second paragraph of the second section relating to ambassadors the word "all" has been inserted after the word "In" and before the word "cases."

4. The article "a" has been sricken out in the sentence "the State shall be a party," and

5. In the last paragraph after the word "all" and before the words "other cases," the article "the" has been inserted.

The Articles of Confederation had given to the Congress the sole and exclusive right and power of sending and receiving ambassadors. Such representatives were not justiciable by the law of nations in any forum. The right to receive and send them having been granted to the Federal power, the Constitution extended original jurisdiction over them, and also jurisdiction in all cases in which a State should be a party to the Supreme Court.

This was an extension, so far as the States were concerned, of the jurisdiction of the former Congress to all cases, including as well those which could arise under the articles of Confederation, as those which could arise under the larger grant of judicial power in the Constitution.

The Constitution was not ratified in the elder and more populous States by any very enthusiastic or large majority. The vote in New Hampshire was 57 to 46; in Massachusetts, 187 to 168; in New York, 30 to 27, and in Virginia the majority was only 10.

How is the Constitution to be interpreted?

This question has been answered both by the decisions of the Courts and by contemporaneous exposition.

In *Rhode Island* v. *Massachusetts* (12 *Peters*, 721) the Court said:

"It is therefore a question of construction whether the controversy in the present case is within the grant of judicial power. The solution of this question must necessarily depend on the words of the Constitution; the meaning and intention of the Convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several States, together with a reference to such sources of judicial information as are resorted to by all Courts in construing statutes and to which this Court has always resorted in construing the Constitution."

There are some side-lights thrown upon this question by the correspondence and debates of the period. In the debates in Congress on the 3d of January, 1802, Mr. Rutledge said with italics which were his own:

"During the throes and spasms, as they have been termed, which convulsed this nation prior to the late presidential election, strong doubts were very strongly expressed whether the gentleman who now administers this government was attached to it *as it is*. Shortly after his election, the legislature of Rhode Island presented a congratulatory address, which our Chief Magistrate considered as soliciting some declaration of his opinions of the Federal Constitution, and in his answer, deeming it fit to give them, he said: 'The Constitution *shall* be administered by me according to the safe and *honest* meaning contemplated by the *plain understanding of the people at the time of its adoption* —a meaning to be found in the explanations of those who advocated, not those

who opposed it; these explanations are preserved in the publications of the time.' To this high authority I appeal—to the honest meaning of the instrument—the plain understanding of its framers. I, like Mr. Jefferson, appeal to the opinions of those who were the friends of the Constitution at the time it was submitted to the States."—(4 *Ell. Deb.*, 446.)

Gouverneur Morris, in his letter to Timothy Pickering, dated December 22d, 1814, says:

"My Dear Sir: What can a history of the Constitution avail towards interpreting its provisions? This must be done by comparing the plain import of the words with the general tenor and object of the instrument. That instrument was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit, excepting nevertheless a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases, which, expressing my own notions, would not alarm others nor shock their self-love, and to the best of my recollection this was the only part which passed without cavil. * * * * Gouverneur Morris."—(1 *Ell. Deb.*, 506.)

WHAT WAS "THE HONEST MEANING CONTEMPLATED BY THE PLAIN UNDERSTANDING OF THE PEOPLE AT THE TIME OF THE ADOPTION" OF THE CONSTITUTION, AS TO THE JUDICIAL POWER WHICH THEY HAD DELEGATED, AND AS TO THE TRIBUNAL BY WHICH IT WAS TO BE EXERCISED ADVERSELY TO THE STATES?

The ratification by the State of New York contained this statement:

"That the judicial power of the United States in cases in which a State may be a party does not extend to criminal prosecutions or to authorize any suit by any person against a State."—(1 *Ell. Deb.*, 329.)

Mr. Luther Martin, in his letter on the Federal Convention, presented the Report of the Committee of the Whole containing the Resolutions which were submitted for the action of the Convention. The 13th Resolution was as follows:

"That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, cases arising under the laws of the United States, impeachment of any national officers, and questions which involve the national peace and harmony."

In the dedates in the Pennsylvania Convention, Mr.

Wilson, who had been a member of the Federal Convention, said:

"In two cases the Supreme Court has *original* jurisdiction—that affecting ambassadors, and when a State shall be a party. It is true, it has *appellate* jurisdiction *in more*, but it will have it under such restrictions as the Congress shall ordain. I believe that any gentleman possessed of experience or knowledge on this subject will agree that it was impossible to go further with any safety or propriety, and that it was best left in the manner in which it now stands."—(2 *Ell. Deb.*, 493.)

In the Virginia Convention, Mr. George Mason said:

"I am greatly mistaken if there be any limitation whatsoever with respect to the nature or jurisdiction of these Courts. If there be any limits they must be contained in one of the clauses of this section, and I believe on a dispassionate discussion it will be found that there is none of any check. All the laws of the United States are paramount to the laws and constitution of any single State. The judicial power shall extend to all cases in law and equity arising under this Constitution. What objects will not this expression extend to?"—(3 *Ell. Deb.*, 521.)

Mr. John Randolph, who had been a member of the Federal Convention, said:

"If the State judiciary could make decisions conformable to the laws of their States, in derogation to the general government, I humbly apprehend that the Federal Government would soon be encroached upon. If a particular State should be at liberty through its judiciary to prevent or impede the operation of the general government, the latter must soon be undermined. It is then necessary that its jurisdiction should extend to all cases in law and equity arising under this Constitution, and the laws of the United States, * * * Although I do not concur with the honorable gentleman that the judiciary is so formidable, yet I candidly admit that there are defects in the construction, among which it may objected too great extension of jurisdiction. I cannot say, by any means, that its jurisdiction is free from fault. Though I conceive the objections to be proper, it is ambiguous in some parts, and unnecessarily extensive in others. It extends to cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right arising from this Constitution. Nothwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe if it had been more clearly expressed. What do we mean by the words, 'arising under the Constitution?' What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word '*arising*' will be carried so far that it will be made use of to aid and extend the Federal jurisdiction."

In the North Carolina Convention, Governor Johnston said:

"MR. CHAIRMAN: The learned member from Anson says that the Federal Courts have exclusive jurisdiction of all cases in law and equity arising under

the Constitution and laws of the United States. The opinion which I have always entertained is that they will, in these cases, as well as in several others, have concurrent jurisdiction with the State Courts, and not exclusive jurisdiction. * * * * The Constitution takes no power from the State Courts which they now have."—(4 *Ell. Deb.*, 141.)

In the debates in Congress on the 3d of January, 1802, Mr. Mason, of Virginia, said:

"When I view the provisions of the Constitution on this subject, I observe a clear distinction between the Supreme Court and other courts. With regard to the institution of the Supreme Court, the words are imperative; while with regard to inferior tribunals they are discretionary. The first "shall," the last "may" be established. And surely we are to infer from the wise sages that formed the Constitution that nothing was introduced into it in vain. Not only sentences, but words and even points elucidate its meaning. When, therefore, the Constitution, using this language, says the Supreme Court *shall* be established, are we not justified in considering it a constitutional creation, and, on the other, from the language applied to inferior courts, are we not equally justified in considering their establishment as dependent upon the Legislature who may from time to time ordain them as the public good requires? * * * * On this point there is great force in the remark that among the enumerated powers given to Congress, while there is no mention made of the Supreme Court—the power of establishing inferior courts is expressly given. Why this difference, but that the Supreme Court was considered by the framers of the Constitution as established by the Constitution, while they considered the inferior courts as dependent upon the will of the Legislature."—(4 *Ell. Deb.*, 442.)

The contemporaneous literature, though less formal than the records of the debates, is equally expressive of "the honest meaning contemplated by the plain understanding of the people at the time of the adoption" of the Constitution.

In the *Independent Gazetteer*, October 5, 1787, it was said:

"And it is worthy of remark that there is no declaration of personal rights premised in most free constitutions and that trial by jury in civil cases is taken away; for what other construction could be put on the following, viz.: Art. 3, § 2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have *original* jurisdiction; in all other cases above mentioned the Supreme Court shall have *appellate* jurisdiction, both as to law and fact.' . . . . October 19, 1787. I will conclude my observations on this section in the new Constitution. In all cases affecting ambassadors, other public ministers and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction, and in the other cases above mentioned—that is, particular civil cases

in which jurisdiction is given to the Federal Court—the Supreme Court shall have *appellate* jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make. . . . . November 10, 1787. In civil cases the Federal Court is like a Court of Chancery, except that it has *original* jurisdiction only of *State* affairs; in all other matters it has *appellate* jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make."

In the *Pennsylvania Packet*, January 22d, 1788, it was urged that

"There was no occasion for inferior courts of the General Government to be appointed in the different States and that such ought not to be admitted—that the different State judiciaries in the respective States would be competent to and sufficient for the *cognizance in the first instance* of all cases that should arise under the laws of the General Government—that the judiciaries of the respective States not having power to decide upon the laws of the General Government, but the determination of those laws being confined to the judiciaries appointed under the authority of Congress in the first instance as well as on appeal there would be a necessity for judges," &c. . . . . February 8, 1788. "Should any question arise between a foreign consul and any of the citizens of the United States however remote from the seat of Empire, it is to be heard before the judiciary of the General Government, and in the first instance to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of dispute." . . . . . February 21, 1788. "That a supreme jurisdiction was indispensable cannot be denied. It is equally true that in order to insure the administration of justice it was necessary to give it all the powers, *original* as well as *appellate*, the Constitution has enumerated. * * That if to insure these extensive authorities were necessary, particularly so were they in a tribunal constituted as this is, whose duty it would be not only to decide all national questions which should arise within the Union, but to control and keep the State judicials within their proper limits whenever they shall attempt to interfere with its power." . . . . . February 25, 1788. "It is complained that the powers of the national judiciary are too extensive. This objection appears to have the greatest weight in the eyes of gentlemen who have not carefully compared the powers which are to be delegated with those that had been formerly delegated to Congress. * * * * Questions that are of national concern and those cases which are determinable by the general laws of the nation are to be referred to the national judiciary, but they have not anything to do with a single case, either civil or criminal, which respects the private and particular concerns of a State or its citizens." . . . . August 4, 1788. "In all other cases to which the judicial power of the United States extends, and in which the Supreme Court of the United States has not original jurisdiction, the causes shall be heard, tried and determined in some one of the State Courts * * that persons aggrieved by any judgment, sentence or decree of the Supreme Court of the United States in any case in which that Court has original jurisdiction shall, upon application, have a commission, to be issued by the President of the United States, to correct errors in such judgment or to review such decree."

In the *Letters of a Federal Farmer*, it was said October 8, 1787:

"It is proper that the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the nation. By Art. 3, sect. 2, the powers of the federal judiciary are extended (among other things) to all cases between a State and a citizen of another State, between citizens of different States and between a State and the citizens thereof and foreign States, citizens or subjects. Actions in all these cases, except against a State government, are now tried and finally determined in the law courts of the States respectively, and as there are no words to exclude these courts of their jurisdiction, in these cases they will have concurrent jurisdiction with the inferior federal courts in them. * * Whether the jury trial is not excluded in the Supreme Judicial Court is an important question. By Art. 3, sect. 2, all cases affecting ambassadors, other public ministers and consuls, and in those cases in which a State shall be party, the Supreme Court shall have jurisdiction, in *all* the other cases before mentioned the Supreme Court shall have *appellate* jurisdiction. * * This court is to have appellate jurisdiction in all the other cases before mentioned. * * * How far it may be proper so to humble a State as to oblige it to answer to an individual in a court of law is worthy of consideration. The States are now subject of no such actions and this new jurisdiction will subject the States to actions and processes which were not in the contemplation of the parties when the contract was made."

In the *Letters of Brutus*, October 18, 1787, it was said:

The judicial power of the United States is to be vested in a Supreme Court, and such inferior Courts as Congress may from time to time ordain and establish. The powers of these Courts are very extensive. Their *jurisdiction* comprehends *all civil causes except such as arise between citizens of the same State*, and it extends to all cases in law and equity arising under the Constitution." . . . February 14, 1788. "I would here observe that the judicial power extends expressly to all civil cases that may arise, save such as arise between citizens of the same State. * * * Nothing more, therefore, is necessary to give the Courts of Law under this Constitution complete jurisdiction of all civil causes, but to comprehend cases between citizens of the same State not included in the foregoing exception." . . . February 21, 1788. * * "It is improper because it subjects a State to answer in a Court of Law to the suit of an individual. This is humiliating and degrading to a Government, and what I believe the supreme authority of no State ever submitted to. * * * In the payment of these debts they have given notes payable to the bearer. At least, this is the case in this State. *Whenever a citizen of another State becomes possessed of one of these notes he may commence an action in the Supreme Court of the general government, and I cannot see any way in which he can be prevented from recovering.*" . . . February 28, 1788. "Although it is proper that the Courts of the general Government should have cognizance of all matters affecting ambassadors, foreign ministers and consuls, yet I question much the propriety of giving the Supreme Court original jurisdiction in all cases of this

kind. * * * Should a suit be brought against such a one by a citizen, through inadvertency or want of information, he will be subject to an action in the Supreme Court. All the officers concerned in issuing or executing the process will be liable to like actions. Thus may a citizen of a State be compelled at great expense and inconvenience to defend himself against a suit brought against him in the Supreme Court for inadvertently commencing an action against the most menial servant of an ambassador for a just debt. * * * The appellate jurisdiction granted to the Supreme Court in this paragraph has justly been considered as one of the most objectionable parts of the Constitution. Under this power appeals may be had from inferior Courts to the Supreme Court in every case to which the judicial power extends, *except in the few instances in which the Supreme Court will have original jurisdiction:* * * * *but in all these cases it is declared the Supreme Court shall have appellate jurisdiction except in those which affect ambassadors, other public ministers and consuls, and those in which a State shall be a party.*"

It is obvious, therefore, that "the honest meaning contemplated by the plain understanding of the States at the time of the adoption" of the Constitution was:

1. That they retained their position that they should be justiciable in the highest Federal tribunal only.

2. That they created the Supreme Court as such tribunal; and themselves gave it directly, and without the intervention of Congress, a jurisdiction which they expressly defined.

3. That they advisedly divided such jurisdiction into original and appellate.

4. That by "original" they intended "exclusive."

5. That by "appellate" they intended a review by appeal of the decisions "in all the other cases before mentioned" of the then existing State Courts, and of inferior Federal Courts.

6. That they intelligently enlarged the area of the judicial power, theretofore conferred upon Congress, so as to embrace not only disputed boundaries and conflicting private land grants, but also "all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority," and that they did this with a complete under-

standing of the full extent of the power which they conferred.

7. That they understood the distinction between "cases in law and equity," and that they used the words "all cases" without qualification or limitation as embracing all cases to which they had extended the judicial power, no matter how such "cases" might thereafter arise.

8. That they adhered tenaciously to their original position that they would not surrender their unassailable sovereignty and consent to become originally justiciable save in the Court of "last resort."

9. That to maintain their position and to prevent any question in relation thereto, they advisedly and intelligently and conclusively agreed between themselves and to and with each other that—

"In all cases in which a State shall be party the Supreme Court shall have original jurisdiction"—

not appellate, but original in the sense which they intended—original and exclusive of "all cases" in which they or either of them—"a State"—"shall be party." By so agreeing they finally and forever closed the door against the suggestion that they had intelligently assented to be justiciable in an inferior Federal Court.

Is the original jurisdiction conferred by the Constitution upon the Supreme Court an exclusive jurisdiction, and was it so understood at the time?

This question has already been partially answered by the quotations which have been given from the contemporaneous literature.

The Republicans, or, as they were sometimes called, the Anti-Federalists, had attacked the grant of judicial power with great vigor, and contended that under its broad pro-

visions, and under the power of Congress to ordain and establish inferior Courts, the sovereignty of the States would be demeaned, and the States themselves rendered justiciable in such inferior Courts.

The position of the Republicans is thus stated by Mr. Van Santvoord (*Lives of the Chief Justices*, p. 237):

"The Constitution had barely sketched the outline of a Federal Judiciary; it had marked out the ground and defined the fixed boundaries on which the superstructure was to stand; but the edifice itself, was left to be reared by the Legislature. It declared that the judicial power of the United States should be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish, thus leaving a wide margin for the action of the Legislature. No part of the system had been regarded with more distrust than this. It was thought to contain an element of power dangerous to the sovereignty and existence of the several States. The establishment of *inferior Courts* especially, had been resisted, even in the Federal Convention, as unnecessary, it being proposed to establish a Supreme Court simply as an appellate tribunal from the decisions of the State Courts, which latter, it was thought, might be appropriately invested with jurisdiction in offences against the United States, admiralty cases, &c., &c., as under the Confederation."

It is evident that the phrase "original jurisdiction" was understood by the framers of the Constitution, and by its friends, as being synonymous with "jurisdiction in the first instance." Such understanding is sustained by the lexicographers. Thus in the *Imperial Dictionary* original jurisdiction is thus defined:

"The right of determining a cause in the first instance. Primitive, First."

In *Bouvier's Law Dictionary* the phrase is thus defined:

"That which is given to Courts to take cognizance of cases which may be instituted in those Courts in the first instance."

An illustration may serve to confirm this definition: If the State of New York should, by an amendment of its Constitution, provide that all persons having claims against the State, might maintain an action therefor, and serve process therein upon the Governor, and that the Court of Appeals should have original jurisdiction of all cases in

standing of the full extent of the power which they conferred.

7. That they understood the distinction between "cases in law and equity," and that they used the words "all cases" without qualification or limitation as embracing all cases to which they had extended the judicial power, no matter how such "cases" might thereafter arise.

8. That they adhered tenaciously to their original position that they would not surrender their unassailable sovereignty and consent to become originally justiciable save in the Court of "last resort."

9. That to maintain their position and to prevent any question in relation thereto, they advisedly and intelligently and conclusively agreed between themselves and to and with each other that—

"In all cases in which a State shall be party the Supreme Court shall have original jurisdiction"—

not appellate, but original in the sense which they intended—original and exclusive of "all cases" in which they or either of them—"a State"—"shall be party." By so agreeing they finally and forever closed the door against the suggestion that they had intelligently assented to be justiciable in an inferior Federal Court.

IS THE ORIGINAL JURISDICTION CONFERRED BY THE CONSTITUTION UPON THE SUPREME COURT AN EXCLUSIVE JURISDICTION, AND WAS IT SO UNDERSTOOD AT THE TIME?

This question has already been partially answered by the quotations which have been given from the contemporaneous literature.

The Republicans, or, as they were sometimes called, the Anti-Federalists, had attacked the grant of judicial power with great vigor, and contended that under its broad pro-

visions, and under the power of Congress to ordain and establish inferior Courts, the sovereignty of the States would be demeaned, and the States themselves rendered justiciable in such inferior Courts.

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An illustration may serve to confirm this definition: If the State of New York should, by an amendment of its Constitution, provide that all persons having claims against the State, might maintain an action therefor, and serve process therein upon the Governor, and that the Court of Appeals should have original jurisdiction of all cases in

which the State shall be party, it could hardly be contended that such grant of jurisdiction was not exclusive, or that the Legislature might authorize such actions to be maintained in the first instance in an inferior Court.

The burden of defending the Constitution against this allegation, that the States had made themselves justiciable in an inferior federal Court, fell upon Mr. Hamilton.

He had been a member of the Philadelphia Convention. He had introduced his own plans, and discussed with intelligence the plans of others. He had assented to the Report of the Committee on Detail. He was therefore entirely familiar with the question involved. He answered the objections in a series of papers now known as "*The Federalist*," and which concededly had an important and controlling influence in securing the adoption and ratification of the Constitution.

In No. 81, he said as follows:

"The Supreme Court is to be invested with *original* jurisdiction only in cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party. In cases in which a State might happen to be a party it would ill suit its dignity to be turned over to an *inferior* tribunal. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes and those of a nature rarely to occur. In all other cases of Federal cognizance original jurisdiction would appertain to the inferior tribunal and the Supreme Court would have nothing more than an appellate jurisdiction."

By this statement he adopted the popular understanding that the original jurisdiction of the Supreme Court was to be exclusive and that in cases in which a State should be a party, the Supreme Court alone was invested with original and exclusive jurisdiction. No other interpretation is to be given to the words "in cases in which a State might happen to be a party it would ill suit its dignity to be turned over to an inferior tribunal."

This is a contemporaneous exposition by one capable of explaining the result of his own labors, and is notable as

not making any distinction between the justiciability of a State arising from subject-matter, and its justiciability arising from party character. The assertion made to the public who were to adopt and ratify the Constitution was that in cases in which a State shall be a party the Supreme Court would have original, and—as the parties who used the word intended—exclusive jurisdiction, and that, in those cases in which a State might be a party it would ill suit its dignity to be turned over to an inferior tribunal.

This answer of Mr. Hamilton's has been otherwise confirmed.

In the case of *Chisholm* v. *Georgia*, 1793 (2 *Dallas*, 425, 474, 475) it was said:

"*Mr. Randolph, Attorney-General:* I hold it therefore to be no degradation of sovereignty in the States *to submit to the supreme judiciary of the United States.*

Jay, Chief Justice: Let us now turn to the Constitution. The people therein declare that their design in establishing it comprehended six objects * * 2d. To establish justice * * * * It may be asked what the precise sense and latitude in which the words "to establish justice" as here used are to be understood. The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the 2d section of the 3d article where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases * * 2d. To all cases arising under the laws of the United States, because as such laws constitutionally made are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due *but by a tribunal deriving authority from both parties.*"

In *Rhode Island* v. *Massachusetts* (12 *Peters*, 720) this Court said:

"Those States in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendant power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, *should be exercised by this Court as one of original jurisdiction.* The States waived their exemption from judicial power as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, *but which they would not grant to any inferior tribunal. By this grant, this Court has acquired jurisdiction* over the parties in this case, *by their own consent and delegated*

authority; as their agent for executing the judicial power of the United States in the cases specified."

These expressions of opinion and these citations from contemporaneous authorities would seem to be persuasive evidence that the justiciability of the States in all cases arising under the Federal laws was admitted and conceded from the outset, and that such cases were to be decided by a tribunal deriving authority from both parties. That tribunal was asserted at the time—in the Constitution, in the judiciary act of 1789, in the Revised Statutes, and by the practice of a hundred years—to be the Supreme Court of the United States exclusively and alone.

Again. Original jurisdiction, as it is primary, must of necessity be exclusive. There are but two kinds of jurisdiction: original and appellate. Appellate cannot be original, for as the term imports, it is revisory only. The appellate jurisdiction of the Supreme Court is given by the Constitution "in all other cases." That is in all other cases than those in which the Constitution had already given original jurisdiction. Appellate jurisdiction therefore is not given over that to which the original jurisdiction is extended. Original jurisdiction cannot be revisory only, for then it must cease to be original. As it cannot be revisory or appellate, it must be exclusive. Otherwise it would cease to be primary. This seems to have been the view of this Court so far as it has expressed any (*Osborn v. United States*, 9 *Wheat.*, 820. *Rhode Island v. Massachusetts*, 12 *Peters*, 657).

If the jurisdiction in all cases in which a State shall be party is original and primary and exclusive in the Supreme Court, then it cannot be participated in by any other federal court, nor can Congress lawfully authorize such participation. The States have not consented to this. Nothing

is to be taken against them by implication. They have consented to the original and exclusive jurisdiction of the Supreme Court, and of it alone, in all cases in which they or either of them shall be parties.

It is not material how this section of the Constitution is construed, that is, whether as granting *per se* jurisdiction to the Supreme Court, or as dividing a previously granted jurisdiction. In either case and so far as the Supreme Court is concerned the jurisdiction is vested without any act of Congress.

The grant of federal jurisdiction is two-fold. 1st, Of federal subject-matter. 2d, Arising from the character of the parties. As to this jurisdiction the States have assented, but they have made no distinction in their assent corresponding with this division of the grant of judicial power.

As to the States it is immaterial whether the jurisdiction be claimed in the federal courts by reason of subject-matter only, or by reason of the character of the parties only, or by reason of both subject-matter and party character uniting and coalescing in the same action. The States knew that in either event such jurisdiction could be exercised in one way only. That was by "a case" the foundation of which should be either subject-matter, or party character, or both, so presented and formulated as to be susceptible of judicial apprehension and decision. In such a "case" they assented, and as much under one clause of the Constitution as the other, to the jurisdiction of the federal court.

But the States limited the federal tribunals in which they would be justiciable to the Supreme Court, and the United States assented to such limitation. Both agreed that "in all cases in which a State shall be party," no matter how it arose—whether by subject-matter or party character, or by

both—that in all cases in which a State shall be party the Supreme Court should have original jurisdiction; and both parties then interpreted, and Congress ever since has interpreted "original jurisdiction" as jurisdiction in the first instance, and as exclusive jurisdiction.

The States never assented to a division of the phrase, "all cases in which a State shall be party," so as to give the Supreme Court jurisdiction when it arose from party character only, and to exclude it, or to confer it upon an inferior court when it arose from subject-matter also. Both parties assented to the exclusive jurisdiction of the Supreme Court in all cases—not in some—but in all cases in which a State shall be party.

There would be neither sense nor soundness in the attempted distinction. Why, if, when party character *alone* is involved, the dignity of a State would not permit it to be justiciable in any other than the Supreme Court, should not the same dignity prevail and the same result follow when party character and subject-matter coalesce? No solid reason exists for the distinction now attempted to be maintained.

"The honest meaning contemplated by the plain understanding of the people," who ratified the Constitution, was, that they had surrendered their sovereignty and waived their exemption from judicial power only in one tribunal, viz.: The Supreme Court of the United States. This understanding has been confirmed by the action of Congress from the adoption of the Constitution to the present time, unless the construction now sought to be put by the plaintiffs in error upon the Judiciary Act of 1875 has overturned it.

The History of the Judicature Act of 1789.

To understand this Act and its various provisions, it is necessary to recur again to the discussion and the criticism to which the Constitution was subjected before it was adopted by the States.

The Act of 1789 was passed on the 24th of September. The First Congress assembled in Federal Hall in New York on March 4th, 1789, but there was no quorum present, and it was not until the 30th of April following that the organization of the Government was completed by the inauguration of the President. As soon after such inauguration as a quorum could be obtained Mr. Ellsworth moved the appointment of a committee to draft a law establishing the judicial Courts of the United States. He was appointed chairman of such committee.

He had been a Judge in his own State of Connecticut. He had been a delegate to the Philadelphia Convention, and had defended the Constitution against the attacks which were made upon it. He was, therefore, familiar with all the criticisms to which it had been subjected by its opponents, and with the feeling which then existed against its broad and comprehensive grant of judicial power. He knew that on the 22d of May, 1779—ten years before—the delegates from New York in the Confederate Congress had moved that Congress come to the following resolutions:

Resolved, That it be recommended to the inhabitants of the said pretended State of Vermont to return peaceably to their former jurisdictions, that is to say, those who have separated from the State of N. York to the State of N. York, and those who have separated from the State of New-Hampshire to the State of New-Hampshire.

Resolved, That Congress will readily hear, examine and interpose to obtain a redress of any grievances of *which the said inhabitants* may have cause to complain against *their said respective States*.

He also knew that it was continuously asserted that,

under the grant of judicial power, the Federal Courts would have sole and exclusive cognizance of all controversies between a State and its citizens. He knew that in the debates in Virginia Mr. Mason had said:

"The last clause is still more improper. To give them cognizance in disputes between a State and the citizens thereof is utterly inconsistent with reason or good policy."—(*Ell. Deb., Va. Conv.*)

He knew from the public journals (*Pennsylvania Packet, January* 16, 1788) that it had been asserted that

"The Courts of the several States are to be annihilated."

and from the *New Haven Gazette* and *Connecticut Magazine* (*November* 29, 1787) that

"It is intimated as a probable event that the Federal Courts will absorb the judiciaries of the several States."

He was advised * by the public discussion that there were serious, widespread and complaining charges that the Constitution abolished all legal remedies and substituted equitable ones therefor; that it imperiled trials by jury; that it authorized the reversal of cases at law for errors in fact; that when carried into effect the citizen would be dragged to distant Courts and for trifling subjects of dispute; and that the concurrent jurisdiction of the State Courts would be destroyed.

He knew that Mr. Hamilton had asserted in the *Federalist* that

"The Supreme Court is to be invested with original jurisdiction only in cases * * * * in which a State shall be a party; in cases in which a State might happen to be a party it will ill suit its dignity to be turned over to to an inferior tribunal. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes and those of a nature but rarely to occur."

He knew that this assertion of Mr. Hamilton's had been rendered necessary in order to secure the adoption of the Constitution by the several States.

He knew that the ratification by the States had been

* Appendix, *passim*.

secured with great difficulty, and that several of the States had coupled their ratification with amendments relating to the judicial power upon which they were demanding the immediate action of Congress.

He knew that such amendments were then pending in Congress. He had perhaps drawn the statement which in the statutes follows his Judicature Act (1 *U. S. Stats.*, *p.* 97), in these words:

"The conventions of a number of States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction, or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution: Resolved, that the following articles be proposed, as amendments to the Constitution of the United States."

He had been advised that Massachusetts had proposed the following amendment:

"The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute whether it concerns realty or personalty be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any actions between citizens of different States where the matter in dispute, whether it concerns realty or personalty, is not of the value of fifteen hundred dollars at the least. In civil actions between citizens of different States, every issue of fact arising in actions at common law shall be tried by a jury if the parties or either of them request it."

He had been advised that Maryland had proposed this amendment:

"That the Supreme Federal Court shall not admit of fictions to extend its jurisdiction; nor shall citizens of the same State having controversies with each other be suffered to make collusive assignment of their rights to citizens of another State for the purpose of defeating the jurisdiction of the State courts; nor shall any matter or question already determined in the State courts, be received or agitated in the federal courts; that there be no appeal from law or fact to the Supreme Court, where the claim or demand does not exceed three hundred pounds sterling; that in all cases of trespasses done within the body of a county and within the inferior federal jurisdiction, the party injured shall be entitled to trial by jury in the State where injury shall be committed and that it be expressly declared that the State courts in such cases shall have concurrent jurisdiction with the federal courts, and there shall be no appeal from either except on matters of law, and that no person be exempt from such jurisdiction and trial, but ambassadors and ministers privileged by the law of nations."

He had been advised that New Hampshire had proposed this amendment:

"All common law causes between citizens of different States shall be commenced in the common law courts of the respective States, and no appeal shall be allowed to the federal courts in such cases, unless the sum or value of the thing in controversy amount to three thousand dollars."

He was advised that Virginia had proposed this amendment:

"In all cases affecting ambassadors, other foreign ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction as to matters of law only, except in cases of equity and of admiralty and of maritime jurisdiction in which the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make."

He knew that the ratification by New York was accompanied by a preamble and amendments, as follows:

"And the convention do, in the name and behalf of the people of the State of New York, enjoin it upon their representatives in Congress to exert all their influence and use all reasonable means to obtain a ratification of the several amendments to the said Constitution in the manner prescribed therein.

That Congress shall not constitute, ordain, or establish any tribunals or inferior Courts with any other than appellate jurisdiction, except such as may be necessary for the trial of causes of admiralty and maritime jurisdiction and for the trial of piracies and felonies committed on the high seas, and in all other cases to which the judicial power of the United States extends and in which the Supreme Court of the United States has not original jurisdiction, the causes shall be heard, tried and determined, in some one of the State Courts, with the right of appeal to the Supreme Court of the United States, or other proper tribunal to be established for that purpose by the Congress, with such exceptions and under such regulations as the Congress shall make."

He knew that the State of North Carolina had proposed an amendment similar to that of the State of Virginia.

It became therefore Mr. Ellsworth's duty to reduce the amendments to the fewest number possible, and to avoid by the provisions of the Judiciary Act a recurrence of the opposition which the grant of the judicial power in the Constitution had already excited. His object, therefore, was two-fold: 1st. To incorporate in the amendments, which were subsequently to be submitted to the States, the principal and more important of the suggestions that had

been made; and 2d. To incorporate into the Judicature Act, so as to secure its adoption by Congress, such provisions as should meet the objections not covered by the proposed amendments.

With this reference to the political atmosphere then ob taining, the provisions of the Judicature Act of 1789 will be better understood.

The District Courts were given, exclusively of the courts of the several States, cognizance of all crimes and offences cognizable under the authority of the United States committed within their respective districts, or upon the high seas, and exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law was competent to give it; exclusive original cog nizance of all seizures on land or water, and of suits for penalties and forfeitures incurred under the laws of the United States; and cognizance concurrent with the courts of the several States or the Circuit Courts, of all cases where an alien sued for a tort only in violation of the law of nations or a federal treaty, and concurrent cognizance of all suits at common law where the United States sue; and jurisdiction exclusively of the State Courts of all suits *against* consuls and vice-consuls; provided that the trial of issues of fact in the District Courts in all cases except civil cases of admiralty and maritime jurisdiction should be by jury.

The inquiry is now pertinent, which is suggested but not answered in *Gittings* v. *Crawford* (*Taney's C. C., Dec.* 1), why, when the Constitution had provided that in all cases affecting consuls the Supreme Court should have original jurisdiction, did Mr. Ellsworth in his Judicature Act provide, that the District Courts should have jurisdiction ex-

clusively of the State Courts of all suits *against* consuls and vice-consuls? He had provided in section 13 (*infra*) that the Supreme Court should have exclusive jurisdiction of all suits and proceedings *against* ambassadors or other public ministers, or their domestics or domestic servants, and original but not exclusive jurisdiction of all suits brought *by* ambassadors or other public ministers, or in which a consul or vice-consul should be a party. Why then did he confer upon the District Courts jurisdiction exclusively of the State Courts of all suits *against* consuls? Mr. Ellsworth, adopting the language of Chief Justice Taney, was—

"in the first Congress that met under the Constitution—had taken a prominent and leading part in framing and supporting that instrument—and well understood the meaning of the words he used."

Why then did he, knowing the provision of the Constitution, in the very first Act passed to carry its judicial powers into practical effect, change the jurisdiction in suits against consuls from the original jurisdiction of the Supreme Court to the jurisdiction of the District Courts?

The answer to this inquiry is to be found in the contemporaneous literature.

The *Pennsylvania Packet* had alleged:

"Should any question arise *between a foreign consul* and *any of the citizens* of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the General Government, *and in the first instance* to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of dispute."

Brutus * had said:

"Although it is proper that the courts of the general government should have cognizance of all matters affecting ambassadors, foreign ministers and consuls, yet I question much the propriety of giving the Supreme Court original jurisdiction in all cases of this kind. * * * * Should a suit be brought against such a one by a citizen through inadvertency or want of information he will be subject to an action in the Supreme Court. All the officers concerned in issuing or executing the process will be liable to like actions. Thus

* Supposed to be George Clinton.

may a citizen of a State be compelled at great expense and inconvenience to defend himself against a suit brought against him in the Supreme Court for inadvertently commencing an action against the most menial servant of an ambassador for a just debt."

The objections thus presented, by inference at least, referred to suits *against* consuls by citizens of the United States, and it was alleged that such suits were to be brought in the first instance before the Supreme Court at the seat of government, however inconvenient and expensive such a proceeding might be to the parties in interest.

It was, therefore, to meet this objection upon a minor point, though one which had been greatly discussed, that Mr. Ellsworth provided that the District Courts of the locality should have, exclusively of the State Courts (and thereby sustaining the exclusive jurisdiction of the Federal Courts), jurisdiction of all suits *against* consuls and vice-consuls.

Having yielded this on behalf of a class of officers who were probably not then in existence, and who, when they did come into existence, were expected to be a numerous and widely-scattered class, and having sustained the exclusive jurisdiction of the Supreme Court in all proceedings against ambassadors or other public ministers, or their domestics or domestic servants, and having also given it original but not exclusive jurisdiction of all suits brought by such officers, Mr. Ellsworth successfully met the public objection and criticism as to the exclusive jurisdiction of the Supreme Court, and as to the inconvenience and expense to which citizen suitors were to be subjected in their suits against consuls and vice-consuls.

The jurisdiction conferred upon the Circuit Courts was as follows (§ 11):

"That the Circuit Courts shall have original cognizance *concurrent* with the Courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds exclusive of costs the sum or

value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party or the suit is between a citizen of the State where the suit is brought and a citizen of another State. * * But no person shall be arrested in one district for a trial in another in any civil action before a Circuit or District Court, and no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that where he is an inhabitant or in which he shall be found at the time of serving the writ. Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover said contents if no assignment had been made except in cases of foreign bills of exchange."

The jurisdiction of the Supreme Court was regulated as follows (§ 13):

"That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction, and shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party; and the trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury. (§ 16.) That suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law. (§ 17.) That all the said courts of the United States shall have power to grant new trials in the cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law. (§ 22.) Upon a like process may final judgments and decrees in civil actions in suits in equity in a Circuit Court brought there by original process * * where the matter in dispute exceeds the sum or value of two thousand dollars exclusive of costs may be re-examined and reversed or affirmed in the Supreme Court, but there shall be no reversal * * for any error in fact."

If the amendments proposed by the several States and the provisions of the Judicature Act of 1789 be compared with the grounds of opposition and criticism discussed in the contemporary public literature, it will be at once evident that Mr. Ellsworth, either by the amendments, or by the provisions of his Judicature Act, substantially obviated all the grounds of complaint and opposition which had been made to the Constitution and thereby secured, though

with some difficulty in the House of Representatives, the adoption of the Act of 1789.

The provision that the Supreme Court should "have exclusive jurisdiction of all controversies of a civil nature where a State is a party except between a State and its citizens, and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction," was a complete and perfect answer to all the criticisms which had been made upon the Constitution, and was a most emphatic confirmation of the common understanding and the positive assertion of Mr. Hamilton that the Supreme Court alone would have original and exclusive jurisdiction of all controversies of a civil nature where a State is a party.

This provision was reënacted as Section 687 of the present Revised Statutes in these words:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original but not exclusive jurisdiction."

and it remained the law from the date of Mr. Hamilton's communication until the present time.

These repeated declarations by Congress were within the scope of its constitutional power. The Constitution vested the jurisdiction in the Supreme Court and made it original in all cases in which a State shall be a party, and in carrying out the understanding of the period, Congress interpreted, as it had a right to do, the word "original" as "exclusive," and it reaffirmed the understanding of the people that they had so used the word "original" in their Constitution; and that they had given to the Supreme Court exclusive jurisdiction of all cases in which a State shall be a party—that is, of all cases which arose under the grant of judicial power which they had conferred upon the United States.

Neither the Constitution nor Congress limited the class of cases in which a State should be a party which should be within the exclusive jurisdiction of the Supreme Court. The language of the Constitution is "in all cases in which a State shall be party." The language of the Act of 1789 is: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party except," &c.

Congress engrafted upon the constitutional limitation of tribunal in which the States should be justiciable two exceptions, both of which relate to party character. The first excludes any jurisdiction in the Supreme Court of a controversy between a State and its citizens as subjects of original jurisdiction; and the second divides the jurisdiction over controversies between a State and citizens of other States or aliens between the Supreme Court and what was obviously intended to be a concurrent jurisdiction. This concurrency was understood at the time to be a concurrency between the Supreme Court and the Courts of the several States, and such construction was warranted by the facts existing at the time, viz., that the Constitution vested the Supreme Court without any Act of Congress with its jurisdiction; that there were no other inferior Federal Courts then in existence, and that the State Courts were then in existence and in the full discharge of their judicial duties.

This view is strengthened by the language of Mr. Justice Miller in *Wisconsin* v. *Duluth* (2 *Dill.*, 412), who said:

"There is every reason, therefore, to infer that Congress, in declaring that the original jurisdiction of the Supreme Court in this class of cases shall not be exclusive, had reference to the jurisdiction over the same class of cases intended to be left with the State Courts, and which, as we have already seen, they have uniformly and constantly exercised without objection."

Thus far, therefore, there is nothing in the history of the Constitution or in the language of the instrument itself, or in the Acts of Congress thereunder, which distributes the

assent of the States to their justiciability in the Supreme Court between cases which arise from Federal subject-matter and those which arise from party character. The suggestion of such a distribution of assent was reserved for a subsequent period, and was not put forward, as a fair or just interpretation of the assent of the States, or of their surrender of their impregnable position of non-justiciability in any court, until after the adoption of the Eleventh Amendment.

The History of the Eleventh Amendment.

Prior to the adoption of the Constitution it was not anticipated that a State, by virtue of that instrument, could be brought, adversely to itself, into a Federal Court. This is evident from the debates.

Madison (3 *Ell. Deb.*, 485, 6) said:

"The Federal jurisdiction in controversies between a State and citizens of another State had been much objected to, and perhaps without reason. It is not in the power of individuals to call any State into Court. The only operation the clause can have is that if a State should wish to bring suits against a citizen it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State Courts. It appears to me that this clause can have no operation but to give a citizen a right to be heard in a Federal Court, and, if a State should condescend to be a party, this Court may take cognizance of it."

Marshall (3 *Ell. Deb.*, 554, 555) said:

"With respect to disputes between a State and citizens of another State, its jurisdiction has been decried with unusual vehemence, I hope that no gentleman will think that a State will be called at the bar of a Federal Court. It is not rational to suppose that the sovereign power should be dragged before a Court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. I see a difficulty in making a State defendant which does not prevent its being plaintiff."

After the ratification of the Constitution in 1789–1791, a new interpretation was placed thereon, which was not in

harmony with the position taken by Mr. Madison and Mr. Marshall in the debates in convention.

In 1792 the Supreme Court made its order in *Chisholm* v. *Georgia* (2 *Dall.*, 419) directing that the State should plead to the writ of the plaintiff, or that a default might be taken.

This was followed by the suit of Vassall, a British subject, in 1793, against the Commonwealth of Massachusetts, and a subpœna in Chancery therein was served upon the then Governor, John Hancock.

These two suits caused great irritation, which culminated in an effort originated by John Hancock, and continued by Samuel Adams, to secure an amendment which would forever put an end to similiar suits. Governor Hancock referred his subpœna to the General Court of the State, which, after deliberation, submitted resolutions to him as follows:

"Friday, September 27, 1793.
IN SENATE.

Whereas, A decision has been had in the Supreme Judicial Court of the United States that a State may be sued in the said Court by citizens of another State, which decision appears to have been grounded on the second section of the Third Article in the Constitution of the United States:

Resolved, That a power claimed, or what may be claimed, of compelling a State to be made defendant in any Court of the United States at the suit of any individual or individuals, is, in the opinion of this Legislature, unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of a Federal Government.

Therefore, Resolved, That the Senators from this State in the Congress of the United States be and they hereby are instructed, and the Representatives requested, to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States. And His Excellency, the Governor, is hereby requested to communicate the foregoing resolves to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures."

These resolutions were accompanied by an address, which contained this sentence:

"With respect to the suit of William Vassal against the Commonwealth no answer will be made."

The result of the agitation was a proposal by Congress to adopt the XIth amendment, which was declared by the President on the 8th of January, 1798, to have been duly ratified, and which, as so ratified, was in these words:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens, or subjects of any foreign State."

The history of the amendment in Congress is as follows:

"MONDAY, January 13th, 1794. Agreeably to the order of the day, the Senate took into consideration the subject of amendments to the Constitution of the United States, and it was agreed to consider at the time the following motion: 'Resolved, etc., that the following Article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States: The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'

TUESDAY, January 14th, 1794. On Motion by Mr. Gallatin that the motion be amended to read as follows: 'The judicial power of the United States, except in cases arising under treaties made under authority of the United States, shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' It passed in the negative. On motion that the motion be amended to read as follows: 'The judicial power of the United States extends in all cases in law and equity to which one of the United States is a party, but no suit shall be prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment.' It passed in the negative. And, on motion to agree to the resolution, it passed in the affirmative—yeas 23, nays 2. Passed January 17, 1794. (*Annals of Cong., 3d Cong., pp.* 29, 31.)

HOUSE OF REPRESENTATIVES—Tuesday, March 4th, 1794. The House resolved itself into a Committee of the Whole House on the resolution sent from the Senate, *proposing an Article of amendment to the Constitution of the United States respecting the judicial power;* and after some time spent therein, the chairman reported that the committee had had the said resolution under consideration, and had made no amendment thereto. The motion was then made and seconded to amend the said proposed Article of amendment at the Clerk's table by adding to the end thereof the words following to wit: 'where such

States shall have previously made provision in their own Courts whereby such suit may be prosecuted to effect.' And on the question thereupon, it passed in the negative—yeas 8, nays 77. The resolution of the Senate containing said proposed Article of amendment was then read the third time; and, on the question that this House doth concur with the Senate in the said proposed Article of amendment to the Constitution of the United States, it was resolved in the affirmative—yeas 81, nays 9. (*Annals of Cong.*, 3d *Cong.*, *pp.* 476, 477.)"

Though the States were surprised by the construction given to the Constitution by which they were made justiciable in a Federal Court, their belief that they were so justiciable in the Supreme Court only was not disturbed, but was rather confirmed by the suits of Chisholm and Vassall; and what the States understood then they have continued to understand and believe to the present day.

An attempt, however, was soon after made to limit the applicability of the amendment to cases other than those which arose under the Federal Constitution and laws, but such attempt did not pass beyond the particular case until the present theory now advocated by the plaintiffs in error was invented and put forward.

In *Olmstead's Case* (*Brightly's Rept.*, 25) there is to be found what is believed to be the first suggestion of any distribution in the assent of the States to their justiciability in the Supreme Court, between cases of what may be called purely Federal origin and those which are otherwise.

Mr. Justice Washington is reported to have said, in a charge to a jury which he made on the 30th of April, 1798, as follows:

"By the Constitution of the United States the judicial power extends to all controversies between a State and citizens of another State, whatever might be the nature of the controversy, and no matter as to the Court in which the cause might be assigned by the legislative distribution of the judicial powers. That amendment declares that the above provision shall not be construed to extend to any suit in law or equity commenced or prosecuted against a State by a citizen of another State or an alien. This was not a suit at law or in equity but in a Court of the law of nations, and in a case of admiralty and

maritime jurisdiction. The question put the learned counsel was: 'is such a case excluded from the cognizance of the District Court by this amendment?' The answer given was that the amendment ought to be so construed, this case being equally within the mischief meant to be remedied; that is, the Court is bound to supply the words 'or cases of admiralty and maritime jurisdiction.' * * * * But there appears to be a solid reason for the limitation of the amendment to cases at law and in equity, and this will throw some light upon the preceding branch of this argument. Suits at law and in equity cannot be prosecuted against a State without making her a party, and the judgment acts directly upon her. But in what manner was the execution to be made effectual? The subject was a delicate one and it was thought best to avoid having it practically tested. But in cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the Court, or of persons bound to produce it or its equivalent, and the proceedings are *in rem*. The Court decides in whom the right is and distributes the proceeds accordingly. In such a case the Court need not depend upon the good will of a State claiming an interest in a thing to enable it to execute its decree. All the world are parties to such a suit and of course are bound by the sentence. The State may interpose her claim and have it decided, but she cannot lie by and, after the decree has passed, say she was a party therefore not bound for want of jurisdiction in the Court. This doctrine in relation to the proceedings of a Court of the law of nations, and in which all nations are interested, might be productive of the most serious consequences to the general government to whom are confided all our relations with foreign governments. And, as at present advised, then we think that the amendment to the Constitution does not extend to suits of admiralty and maritime jurisdiction."

The jury found a verdict in favor of the United States, and the defendant Bright was sentenced to be imprisoned for three months and to pay a fine of $200, and the other defendants to one month's imprisonment and a fine of $50 each; but they were immediately pardoned by the President of the United States, Mr. Madison, who was possibly induced thereto by his understanding of the amendment and possibly, by the influence of Mr. Jefferson whom he succeeded.

This position of Judge Washington does not seem to have commended itself to this Court in the only two cases which have been before it.

In 1820, the Governor of Georgia filed an information in the District Court of the United States for the District of Georgia, praying that certain Africans might be declared

forfeited and be sold. One Bowen interposed a claim. The decree of the District Court dismissed the claim of Bowen, and adjudged the Africans to be delivered to the Governor of Georgia, to be disposed of according to law. Bowen appealed to the Circuit Court, by which his claim was dismissed.

One Madrazo filed his libel in the same District Court against the Governor of Georgia in his official capacity, praying restitution of so many of the slaves as had not been sold and of the proceeds of the residue. Bowen and the Governor of Georgia filed their claims. The District Court dismissed the libel and the claim of Bowen, and Madrazo appealed to the Circuit Court.

The Circuit Court dismissed the claim of Bowen, reversed the sentence against Madrazo and made a decree directing restitution to the libellant, and from such decree an appeal was taken to this Court by the State of Georgia and by Bowen. The decree was reversed, this Court saying, through Marshall, *C. J.*, as follows:

"The decree cannot be sustained as against the State because, if the Eleventh Amendment to the Constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court."

Therefore the decree was reversed (*Georgia* v. *Madrazo*, 1 *Peters*, 124).

Acting upon this suggestion Madrazo (7 *Peters*, 627) filed his libel in admiralty in this Court against the State of Georgia, and prayed the Court to award admiralty process against the State to show cause why the proceeds of the slaves paid into the treasury of the State should not be paid over to the libellant, and the slaves remaining in the possession of the State restored to him. The Chief Justice delivered the opinion of the Court as follows:

"The case is not a case where the property is in custody of a Court of Admiralty or brought within its jurisdiction and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It

is a mere personal suit against a State to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this Court against a State."

This decision seemed to leave untouched the question whether the Eleventh Amendment did or did not include cases of admiralty jurisdiction, but it seemed to reaffirm the position in the original case that the State, if suable at all, was justiciable solely in the Supreme Court.

The position taken by Judge Washington was restated and expanded, virtually so as to embrace the position assumed by the plaintiffs in the present cases, by Mr. Justice Johnson who dissented in the case of *Georgia* v. *Madrazo* (1 *Peters*, 129 *et seq.*). He alludes to the 13th section of the Judiciary Act of 1789, and then says:

"Now it may seem unaccountable at first view why these exceptions should have been extended to controversies between a State and its own citizens, since controversies between a State and its own citizens is not one of the subjects of jurisdiction enumerated in the Constitution. And the solution is to be found in this *—that the grant of jurisdiction as to cases arising under the Constitution, laws, &c., of the United States, and of admiralty and maritime causes, is not restricted to or limited by any relation or description of persons. Controversies, in these branches of jurisdiction, may, therefore, by possibility, arise between a State and its own citizens; certainly, between a State and citizens of other States, or aliens, under the laws of the Union, or in admiralty and maritime cases. As the law regards this information as a civil suit *in rem* on the exchequer side of the admiralty, and it was grounded on a law of Congress—the citizenship of the claimants can have no influence upon the question of jurisdiction. I think, however, that it appears somewhere in this voluminous record that Bowen was a citizen of Georgia; but whether of that State, a sister State, or a foreign State, the controversy, if it be regarded as one with individuals, is expressly excepted from the exclusive jurisdiction of the Supreme Court; and I must think is within the original jurisdiction of the District Court."

Madrazo was stated in the subsequent case (7 *Peters*, 627) to be an alien and a subject of the King of Spain.

The reasoning of Mr. Justice Johnson was not adopted by this Court.

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* This "solution" ignores the opposition to the Constitution in this regard, and the pressure brought to bear on Mr. Ellsworth, which caused him to insert in the Judicature Act the exceptions referred to.

The opinions of Justices Washington and Johnson, in so far as they sought to limit the XIth Amendment to party character only, and to exclude therefrom Federal subject-matter do not seem to be in harmony or consonance with the belief and understanding of the States by whom the amendment was adopted. Massachusetts originated the amendment, and solicited and procured the coöperation of the other States in securing its passage. Her understanding and belief were typical and representative of the understanding and belief of the other States. What she understood and believed is conclusively established by her resolutions of 1793:

"*Resolved*, That the Senators from this State in the Congress of the United States be and they hereby are instructed, and the Representatives requested, to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States. And His Excellency, the Governor, is hereby requested to communicate the foregoing resolves to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures."

This resolution reaffirmed the original understanding that the States were to be plaintiffs only in a Federal Court, and it conclusively evidences the fact that the then understanding of what the States desired, and what they presumed they were effecting, was a protection of their sovereignty against "any suit by an individual or individuals in any Court of the United States," no matter whether he was a citizen or an alien, or whether his cause of action arose from Federal subject-matter or otherwise. Nothing could be more comprehensive or self-asserting than the words:

"As will remove any clause or article which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual in any Court of the United States."

This understanding of the States is shown by the reports,

and notwithstanding the opinions of Justices Washington and Johnson it has been acquiesced in until quite recently.

The question, therefore, now is: Is this amendment and the Constitution upon which it was engrafted to be interpreted in the light of the original position and understanding of the States, or is it to be interpreted under the later and newer light which arises from a centralizing tendency?

The contention of the plaintiffs now is that the character of the parties is absolutely irrelevant, and that Federal subject-matter alone absolutely creates and confers Federal jurisdiction, irrespective of party character.

Three results will flow from sustaining this position:

1. That the intent of the Eleventh Amendment will be defeated, and the Amendment itself will become practically obsolete.

2. That the jurisdiction of the Federal Courts will be extended to suits between a State and its own citizens.

3. That the intent of the Constitution and the Acts of Congress, which was to vest the Supreme Court with exclusive jurisdiction in all controversies of a civil nature where a State is a party, except in the two excepted cases, will be entirely destroyed.

The proper construction of the Constitution, the Judiciary Act of 1789 and the Revised Statutes.

Section 687 of the Revised Statutes provides as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except," &c.

1. It is clear in view of the contemporaneous history and of the language of the Constitution and of the Acts of Congress that no jurisdiction of a suit between a State and citizens thereof was intended to be conferred upon the Circuit Courts of the United States. Neither the grant of

original or removal jurisdiction in the Act of 1875, nor Section 640 of the Revised Statutes, conferred in terms any jurisdiction of either kind of controversies of a civil nature in which a State is a party. Such jurisdiction is claimed solely by reason of the provisions which relate to subject-matter, and it is insisted that the grant in the Act of 1875, or in Section 640 of the Revised Statutes, authorize either original or removal jurisdiction to be exercised in all cases of federal subject-matter irrespective of party character.

This contention has not yet received the approbation of this Court. If, as has been contended, the grant of original jurisdiction to the Supreme Court in all cases in which a State shall be party was a grant of an exclusive jurisdiction then the Act of 1875 cannot properly be interpreted as conferring either original or appellate jurisdiction upon the Circuit Courts of cases in which a State is a party.

In *State of Alabama* vs. *Wollfe* (18 *Fed. Rep.*, 836), the Court uses this language:

"The judicial power extends, as we have seen, to controversies between a State and citizens of another State, which is the case at bar, but no Act of Congress provides in terms for the removal of this class of cases. It may admit of doubt if Congress could provide for the removal of this class of cases, for in the subsequent portion of the Section of the Constitution quoted *supra* it is provided that in cases in which a State shall be a party the Supreme Court shall have original jurisdiction."

The theory upon which the Constitution was adopted and the practice as it has been settled thereunder for nearly a hundred years seems to have been solidly founded. That theory was and the practice has been that questions of federal law between a citizen and a State should originate in a State Court alone and find their way to the Supreme Court in the exercise of its appellate power and in pursuance of the former Judiciary Act (1 *Stats.* 85; 14 *Stats.* 386) and of section 709 of the Revised Statutes.

HAS THE CONCURRENT JURISDICTION OF THE STATE COURTS, OVER SUITS INVOLVING FEDERAL SUBJECT-MATTER, BEEN LAWFULLY TERMINATED, EITHER INTENTIONALLY OR OTHERWISE?

Section 711 of the Revised Statutes of the United States is as follows:

"The jurisdiction vested in Courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the Courts of the several States. * * * * 7. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, and aliens."

This provision, if it be constitutional, which is denied,* seems to terminate the concurrent jurisdiction of the State Courts, and to invest the Supreme Court with exclusive jurisdiction of all cases of a civil nature where a State is a party, save in the excepted cases.

There may be many cases in which the State may be a party plaintiff, in which the defendant need not be of necessity either a sister State or its citizens, or a foreign State or its citizens. One or two illustrations may suffice.

A State may have a suit with a citizen of the District of Columbia, or with a citizen of a Territory (*Railroad* v. *Harris*, 12 *Wall.*, 86; *Hepburn* v. *Ellzey*, 2 *Cr.*, 445; *New Orleans* v. *Winter*, 1 *Wheat.*, 91; *Barney* v. *Baltimore*, 6 *Wall.*, 287).

The District of Columbia is a corporation, and as such is authorized to sue or be sued (*R. S., D. C.*, § 3). It is authorized to issue bonds (17 *Stats.*, 86). A State might lawfully own such bonds, and bring a suit to collect them. Insurance companies are authorized to be formed in such District. A State might insure its buildings therein, and law-

* "It could never have been imagined that the States were to be restricted from suing in their own courts or those of their sister States."—(*Georgia* v. *Madrazo*, 1 *Pet.*, 129.)

fully bring suit to collect the policies. It might have similar suits upon the bonds of a Territory, or upon policies of insurance issued by a Territorial company. It might lawfully bring a suit to enforce the right of eminent domain against a Federal corporation, or to collect taxes therefrom, or, as in these cases, to enforce its police laws.

In these, and in all similar cases—the State would be a party, and, under the provisions of the Revised Statutes, the Circuit Court would have no jurisdiction, because such jurisdiction is vested exclusively in the Supreme Court. (2 R. S., 687).

If the language of Sections 687 and 711 of the Revised Statutes is to be literally interpreted, then all this class of cases are exclusively originally cognizable in the Supreme Court, and the State Courts are excluded from taking jurisdiction thereof.

There is no escape from this save to assert, as the plaintiffs do in substance, that the second subdivision of Section 2, of Article III. of the Constitution, in which the phrase "* * in which a State shall be party" is first used, does not of itself confer any jurisdiction on the Supreme Court, and that the repetition of such phrase in the Act of 1789 and in the Revised Satutes likewise fails to confer any such jurisdiction. The argument in support of this position is brief and is this: The grant of jurisdiction to the Supreme Court is contained in the first subdivision of Section 2 of Article III. The second subdivision only divides the previously granted jurisdiction into original and appellate. What is granted is therefore to be determined solely by the provisions of the first subdivision. So far as the jurisdiction over the States is concerned the grant is there threefold only—1st, Controversies between two or more States. 2d, Between a State and a citizen of another State. 3d,

Between a State or its citizens and foreign States or their citizens. In all cases, therefore, in which "a State is party" and in which there are neither citizen or alien parties, the jurisdiction of the Supreme Court is limited to those cases in which the controversy is between two or more States, and this limitation must control the literal interpretation of these words, in the Act of 1789 and in the Revised Statutes,—"the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party." This limitation has not yet been confirmed in the reports, and to enforce it, and then to hold by implication only, that jurisdiction of a case, where a State, as a party, has a controversy, whether with one of its own citizens, or otherwise, and whether upon Federal subject-matter or not, is given by the 1st and 2d subdivisions of Article III. to Congress, which may invest it in the Circuit Courts, is to hold that the States have surrendered to Congress their power of suing their own citizens in their own Courts, no matter what may be the subject-matter, and that the States have consented to be justiciable in an inferior Federal Court, and have surrendered all right of appeal therefrom. This would be to import into the Constitution a language and an intent, and a limitation which have never yet there been found.

The Construction of the Act of 1875.

However the last question may be resolved it is clear that the Act of 1875 does not in terms expressly disregard the character of the parties, or in terms repeal the literal interpretation of the words in the Constitution and in the Revised Statutes—"in all cases in which a State shall be a party the Supreme Court shall have original and exclusive

jurisdiction," nor does it in terms nullify the XIth Amendment.

The contention now is that the Constitution extended the Federal judicial power to all Federal questions, irrespective of party or citizenship. That jurisdiction arising from the position of a State as a party, or from citizenship, was another and distinct jurisdiction from that arising from subject-matter, and as to the latter, the power of Congress was not limited either by the literal interpretation of other portions of the Constitution, or by the prohibition of the XIth Amendment. It is asserted that the Constitutional grant of power has, by the Act of 1875, been conferred to its fullest extent and *in totidem verbis* upon the Circuit Courts, and that they have therefore now the power, irrespective of citizenship, to entertain all suits in which a Federal question of the designated character is involved. It is conceded that this "original cognizance" is, by Section 1 of the Act of 1875, "concurrent with the Courts of the several States," but it is at the same time contended that by virtue of the provisions of Section 2, authorizing the removal of such suits from the State Courts such concurrency becomes absolutely illusory.

This contention loses sight of the fact that the Act of 1875 does not and could not repeal the Constitutional words giving sole jurisdiction to the Supreme Court, and therefore begs the question first herein discussed. It also loses sight of the fact that the Revised Statutes (§ 687) prohibit the Supreme Court and (§ 711) the Circuit Courts from entertaining jurisdiction "of a controversy of a civil nature between a State and its citizens" which presents the second question here involved. The argument, if pressed, must lead to the assertion that this prohibition was repealed by the Act of 1875. That it was not so repealed by its terms

is evident, unless such repeal was effected by the words: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

Does this general repealing clause confer jurisdiction, under the previous provisions of the act, upon the Circuit Courts of "a controversy of a civil nature between a State and its citizens?"

The Act of 1875 is entitled:

"An Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the remanding of causes from State Courts, and for other purposes."

There is nothing, therefore, in the title, and there is nothing in the Act itself, which intimates any intention on the part of Congress to interfere with or divide the exclusive jurisdiction, if it exists, of the Supreme Court in all controversies of a civil nature in which a State is a party, or to repeal the provisions of the Revised Statutes. Therefore, such interference and repeal can arise by implication only.

Prior to the passage of the Act of 1875, and even since then, it was definitely settled that the Circuit Courts had no jurisdiction between a State and the citizens thereof (*Iowa* v. *Des Moines*, 8 *Fed. Rep.*, 97; *Walsh* v. *Memphis*, 6 *Fed. Rep.*, 797; *Dormitzer* v. *Illinois*, 6 *Fed. Rep.*, 217; *Pacific* v. *Ketchum*, 101 *U. S.*, 289; *The Removal Causes*, 101 *U. S.*, 457);* and when the fact of identity of citizenship appeared, the cause would be remanded (*Iowa* v. *Des Moines*, 8 *Fed., Rep.*, 97).

It was also well settled that the fact that a State railway corporation had had similar corporate powers conferred upon it by another State was not sufficient to authorize the removal of the cause, or to give jurisdiction to the Circuit Court in a

*"The judicial power of the Union was not extended to such cases."—(*Cohen* v. *Virginia*, 6 *Wheat.*, 392).

suit brought by the State in one of its own Courts against such corporation (*Memphis* v. *Alabama*, 97 *U. S.*, 581; *Copeland* v. *Memphis*, 3 *Woods* 651).

It was also affirmatively settled that an act of consolidation did not so destroy the existence of the consolidated corporations as to withdraw them as separate legal entities from the jurisdiction of the States by which they were originally created (*Tomlinson* v. *Branch*, 15 *Wall.*, 460; *Johnson* v. *P. W. & B. Co.*, 9 *Fed. Rep.*, 6 *and note*; *Horne* v. *Boston*, 18 *Fed. Rep.*, 50; *Graham* v. *Boston*, 14 *Fed. Rep.*, 753; *Muller* v. *Dows*, 94 *U. S.*, 447; *Central* v. *Georgia*, 92 *U. S.*, 670).

It was also well settled that the Circuit Courts of the United States had no jurisdiction of a cause in which a State is a party, and if a State were a party and a cause were removed from the State Court to the Circuit Court the latter Court would remand it even after it had been docketed. This was expressly decided by Washington, *J.*, in *Den ex dem. the State of New Jersey* v. *Babcock* (4 *Wash. C. C. R.*, 344) in which he said:

"Upon what justifiable ground can the cause be retained here when the Court perceives from the face of the record that every step which can be taken in it is *coram non judice* and that it must be finally dismissed for want of jurisdiction. By the declaration filed in this case it appears that the State of New Jersey is substantially a party plaintiff in the cause and this is a fact which cannot be controverted at the trial. But this Court cannot hold jurisdiction of a cause wherein a State is a party because it is not bestowed upon it by any Act of Congress."

The Bankruptcy Act of March 2, 1867, contained this provision:

"The several District Courts of the United States be and they hereby are constituted Courts of Bankruptcy, and they shall have original jurisdiction in their respective Districts in all matters and proceedings in Bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this Act. The jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand * * * * and to all acts, matters and things to be done under and by virtue of the bankruptcy until the

final distribution and settlement of the estate of the bankrupt. The several Circuit Courts of the United States within and for the Districts where the proceedings in bankruptcy shall be pending shall have general superintendence and jurisdiction of all actions arising under this Act, and except when a special provision is otherwise made may upon bill, petition or any proper process of any party aggrieved hear and determine the case in a Court of equity."

These provisions gave to the Circuit Court original jurisdiction of all cases and questions arising under the Bankrupt Act. It was a grant of original jurisdiction and was unlimited in its terms. It was founded upon subject-matter and excluded all questions of citizenship.

Under this Act the State of North Carolina brought a suit in the Circuit Court of the United States for the District of North Carolina (*The State of North Carolina* vs. *Trustees of University, &c.*, 5 *Nat. Bank Reg.*, 466), in which the Court said:

"But the power to entertain this suit is claimed by counsel for this Court under the provisions of the Bankruptcy Act of 1867. After a careful examination of the provisions of that Act we are of opinion that it was not designed to confer and does not in fact confer such power. If we could believe that the original jurisdiction conferred by that Act upon the Circuit Courts was as full, or equal in all respects as that conferred upon the District Courts, we could not regard it as intending to produce so inevitable a conflict with the provisions of the Constitution before referred to, limiting and restricting according to our construction, the original jurisdiction in cases in which States are parties to the Supreme Court. We hold that no such jurisdiction as that contended for in this case was intended to be conferred upon this Court; and further, if it was clearly otherwise, that any attempt to do so on the part of Congress would be ineffectual; for, as has been before seen, the Constitution having itself provided that the jurisdiction in such cases should be original in the Supreme Court, it must be regarded as exclusive of the other Courts of the United States—as much so as if the term *exclusive original jurisdiction* had been employed. And this appears to us to be the view entertained by the Court in the case of *Osborn* vs. *The United States Bank*, before cited."

The opinion in this case not being easily accessible is printed as an Appendix hereto.

The conclusion reached by the Court is sustained by the language of the Act of 1789, and of Section 687 of the Revised Statutes, by both of which exclusive jurisdiction in all controversies of a civil nature where a State is a party is given to the Supreme Court.

In *Wisconsin* v. *Duluth* (2 *Dillon*, 406), the State of Wisconsin filed a bill upon what appeared to be Federal subject-matter, claiming that as a State it had a right to bring an original suit in the Circuit Court. The bill was dismissed for want of jurisdiction upon the ground that a State cannot maintain as plaintiff an action in the Circuit Courts of the United States.

The applicability of that decision to the present case is illustrated by the case of *Levy* v. *Laclede* (18 *Fed. Rep.*, 4), in which the Court said:

"If a party could not originally sue in this Court he cannot come into it through a State Court by means of the provisions of the Act I have quoted with regard to removal."

This presents the question involved in this form: Assume other jurisdictional grounds to exist and the defendant, if it were a Federal corporation, had brought its bill *quia timet* in the Circuit Court against the State of Kansas claiming that it was about to commit acts which were violative of the rights of the plaintiff as a Federal corporation, could it have maintained such suit under the Act of 1875? If it could not, can it virtually do the same thing by removing these causes under that Act? Is the jurisdiction under the removal and *quasi*-appellate power larger than the original jurisdiction, the grant being identical?

These enquiries bring back the questions whether the Act of 1875 has repealed the exclusive jurisdiction of the Supreme Court of the United States created by Section 687 of the Revised Statutes, or if the defendant be a corporation of the State, whether the Act of 1875 has repealed the provisions of Section 711 of the Revised Statutes inhibiting the Circuit Courts from taking jurisdiction "of a controversy of a civil nature between a State and its citizens."

It is contended now that the supremacy of the Supreme

Court and its original and exclusive jurisdiction in all civil cases in which a State shall be a party has been destroyed. It is asserted in the logic of this application that the Act of 1875 has destroyed such supremacy by giving the State Courts, concurrently with the Circuit Courts, original jurisdiction of all civil cases in which a State shall be a party, and therefore, by logical consequence, of all cases in which an ambassador shall be a party, whenever the cause of action arises under a Federal law or presents a question of Federal subject-matter.

Can this construction be correct? Is it possible that a State could now be sued in its own courts or in the Circuit Courts for an infringement of a patent for a telegraph or a telephone? Is it possible that an ambassador can now be sued in a State Court or in a Circuit Court by reason of his alleged infringement of a copyright or of a patent? Has the Act of 1875 intelligently overturned, or attempted to overturn, the Constitution and the Revised Statutes, and dragged down to the level of any inferior State Court the jurisdiction of the Supreme Court of the United States in all cases in which a State or an ambassador shall be party, and which presents any question of Federal law? If an ambassador were sued in a State Court or in a Circuit Court for a violation of a copyright or for the infringement of a patent or for any other act involving Federal subject-matter, would this Court when the case came before it assert that the Act of 1875 had overturned so much of the law of nations as had been embodied in the Constitution, in the Judiciary Act of 1789, and in the Revised Statutes for the protection of the ambassadors of a foreign sovereign? Would it admit that the ambassador had lost his representative character as representing the person of his sovereign, and that the sovereign, therefore, had become justiciable

through him in a State Court, or in an inferior Federal Court, by reason of his alleged violation of a private right under a Federal law? Would it hold that hereafter a citizen of New York may maintain an action against his sovereign or remove an action brought by his sovereign in a State Court upon the ground that such citizen has a claim or a defense arising under the Constitution or laws of the United States?

Unless the Court is prepared to follow the plaintiffs in error to this extent of their argument, it must fall back upon the original interpretation placed by the framers of the Constitution, by Mr. Ellsworth, by Congress, and by the Revised Statutes upon the Constitution that the jurisdiction of the Supreme Court in all civil cases in which a State or an ambassador shall be a party was an exclusive jurisdiction and was not to be intermeddled with by any inferior tribunal.

Upon the question whether the Act of 1875 has repealed or attempted to repeal the exclusive jurisdiction of the Supreme Court of the United States as created by Section 687 of the Revised Statutes, or whether the Act of 1875 has repealed the provisions of Section 711 prohibiting the Circuit Courts from taking jurisdiction of "a controversy of a civil nature between a State and its citizens," the reported adjudications are not without their value.

Thus in *Pryse* v. *Pryse* (*L. R.*, 15 *Eq.*, 31, 32) the Court said:

"It can hardly be right to twist the Act into an instrument for claiming a more extended jurisdiction properly belonging to another."

In *National Bank* v. *Harrison* (8 *Fed. Rep.*, 721) the Court said:

"An earlier statute is only repealed by a later one where their provisions cannot be reconciled * * * A later statute which is general and affirmative in its provisions will not abrogate a former which is particular or special. Courts will not allow such an exposition of the statute as will revoke or alter

by construction of general words a previous special statute where the words may have their proper operation without it. These general propositions are so familiar and so well settled that it is unnecessary to quote authority to support them."

In that case it was claimed that the Act of 1875 had repealed clause 10 of Section 629 of the Revised Statutes, which gave the Circuit Courts original jurisdiction,

"of all suits by or against any banking association established in the district for which the Court is held under any law providing for National Banking Associations."

The Court continued:

"Applying them—the general propositions—to the Act of 1875 we are constrained to hold that it does not either expressly or by necessary implication repeal the 10th clause of Section 629 of the Revised Statutes, under which this suit is brought."

Prior to 1875 it was admitted that the District Courts had exclusive cognizance of all suits for penalties and forfeitures under the customs laws. Section 629 of the Revised Statutes in its fourth subdivision gave the Circuit Courts of the United States original jurisdiction

"of all suits at law or in equity arising under any act providing for revenue from imports or tonnage except civil causes of admiralty and maritime jurisdiction and seizures on land or on waters not within admiralty and maritime jurisdiction and except suits for penalties and forfeitures."

The United States brought an action at law in the Circuit Court (*U. S.* v. *Mooney*, 11 *Fed. Rep.*, 476) to recover $20,000 penalties alleged to have been incurred by the defendant by means of false invoices. The defendant moved to dismiss the suit for want of jurisdiction in the Circuit Court to entertain it. The Government relied on the statute of March 3d, 1875, which provided,

"That the Circuit Courts of the United States shall have original cognizance * * of all suits of a civil nature at common law * * * * arising under the Constitution and laws of the United States * * * * or in which the United States are plaintiffs."

The Court said:

"This language in its terms includes this case, because the suit is of a civil nature, is at common law, and the United States are the plaintiffs. Nevertheless, I am of opinion that the Circuit Court has no jurisdiction of it. * *

The restricted meaning attached to the general words by the usage of eighty-six years is presumed to continue."

The Court only arrived at this conclusion by holding, therefore, that the words of general grant in the Act of 1875 were not to be so enlarged as to work a repeal of the jurisdiction which had thitherto been exclusively vested in the District Courts.

In *Venable* v. *Richards* (105 *U. S.*, 636) the Court said:

"The latter act (1875) neither in terms nor by necessary implication abrogates the previous law providing for the removal of causes from the State Courts. It repeals only such acts or parts of acts as are in conflict therewith. If by any reasonable construction the statutes can stand together they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly as the case may be."

If the contention of the plaintiffs be correct it nullifies the XIth Amendment by permitting a State to be sued in the Federal Courts by its own citizens whenever they assert that they have a case arising under the Federal laws; and in this aspect the rights of a State citizen would be larger than those of citizens of other States or aliens.

THE FOLLOWING CONCLUSIONS THEREFORE SEEM TO RESULT.

1. That if the Kansas Pacific Railway Company is a corporation of the State of Kansas the Circuit Court had no jurisdiction of these suits under the Act of 1875, because such jurisdiction is inhibited by § 711 of the Revised Statutes.

2. That if the Kansas Pacific Railway Company has been properly merged under the Acts of Congress into the present Union Pacific Railway Company, such merger does not so destroy the State incorporation as to deprive the State of its right to enforce the duties imposed upon its own corporation by its own laws. The existence of such duties and the right to enforce the performance thereof, and the

methods by which such performance shall be enforced, are not questions which arise under the Act of 1875.

3. That if the plaintiff be a Federal corporation it is not a citizen of any State. It is, as was adjudged in *Orange Bank* v. *Traver* (7 *Fed. Rep.*, 149), "a citizen of the United States but not of any State," and as it claims to exist and do business in more States than one, it can have no domicil and no inhabitancy in any one particular State so as to claim under any judicial logic to be a citizen of that State alone. It is simply and purely a Federal incorporation existing in four States and two Territories, and it is in no judicial sense, therefore, a citizen of any State, and it is as much an inhabitant of a Territory as it is of a State. If, therefore, it is not a citizen of any one of the United States purely and simply, the Circuit Court had no jurisdiction under the Act of 1875, because jurisdiction of such a Federal creation is, whenever the State is a party, given by § 687 of the Revised Statutes, exclusively to the Supreme Court. Further than this the Act of 1875 does not, in terms, authorize the removal of cases in which a State is a party, and the States did not assent to an implied authority to remove save under the exercise of the appellate jurisdiction of this Court.

4. With regard to the individual plaintiffs:

1. So far as a suit in which a State is party is concerned Section 640 of the Revised Statutes has no foundation in the Constitution.

2. So far as such a suit is concerned Section 640 is in direct conflict with Sections 687 and 711, subdivision 7th, which latter section is arranged under the head of "Provisions common to more than one Court," and therefore controls the jurisdiction of the Circuit Court under Section 640.

3. Section 640 is not properly to be interpreted as repeal-

ing Section 687, but considering the dignity of this Court, as well as the dignity of a State, it is to be construed as in subordination to the grant of exclusive jurisdiction given to this Court when a State is a party contained in both the Constitution and Section 687.

4. Section 640 does not, in terms, refer to a suit in which a State is a party. Its language is general, "any suit." The only foundation for this language, and indeed for the Section itself, is in the general grant of judicial power contained in the Constitution. It is an application of a portion only of the granted judicial power to the cases of Federal incorporations and their directors, and the removal is authorized solely by reason of subject-matter. To warrant the removal the section requires the defendant to state under oath

"that such defendant has a defense arising under or by virtue of the Constitution, or of any treaty or law of the United States."

The second section of the Act of 1875 uses this language:

"Any suit * * * arising under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority * * either party may remove," &c.

It is evident, therefore, that as the Act of 1875 repeats the language of the Constitution, it contains within itself the whole grant of judicial power springing from subject-matter, and that it extends the right of removal to "any suit" and to any party. All, therefore, that is granted by Section 640 is regranted and to a larger and fuller extent by the Act of 1875. The Act of 1875, therefore, covers the whole subject-matter of Section 640 and extends the right of removal to every defendant, whether corporation, director or otherwise. As it does cover the whole subject, and embraces every possible defendant, and regulates anew and in conflict with the provisions of Section 640, the whole procedure for effecting the removal, and especially the time

when the proceeding must be commenced, the nature of the transcript to be filed, the condition of the bond to be given, it must appear to be evident that the Act of 1875 was intended as a substitute for Section 640. If it was so intended then the Act of 1875 operates as a repeal of Section 640 (*United States* v. *Tynen*, 11 *Wall*, 92; *Hyde* v. *Ruble*, 104 *U. S.*, 407; *King* v. *Cornell*, 106 *U. S.*, 395; *Holland* v. *Chambers*, 3 *Sup. Ct. Rep.*, 427). If Section 640 is repealed then it follows that the individual plaintiffs claiming to be directors of the Kansas Pacific Railway Company had, as such, no lawful authority to remove from the State Court the suit there brought against them by the State for the reason that the Act of 1875 does not authorize the removal of such a suit.

Prior Adjudications.

In making these suggestions the cases of *United States* v. *Ravara* (2 *Dall.*, 297); *Marbury* v. *Madison* (1 *Cranch*, 137); *Cohens* v. *Virginia* (6 *Wheat.*, 378); *Davis* v. *Packard* (7 *Peters*, 281), and of *Osborn* v. *Bank* (9 *Wheat.*, 820) have not been overlooked. They do not seem, interpreted as they are in *Gittings* v. *Crawford* (*Taney's*, *Dec.*, 1), to close the discussion.

Nor do the cases of *Georgia* v. *Atkins* (1 *Abb. U. S.*, 22), *Texas* v. *Lewis* (14 *Fed. Rep.*, 65), *Illinois* v. *Railway Co.* (15 *Fed. Rep.*, 706), *Railroad* v. *Mississippi* (102 *U. S.*, 135), *Mayor* v. *Cooper* (107 *U. S.*, 247) seem to discuss or decide the points here presented and here arising, and which lead to the question: Do not the Constitution, the Act of 1789, and the Revised Statutes give the Supreme Court exclusive jurisdiction, as against all other Federal Courts, of all cases of a civil nature in which a State is a party and in which the State claims that in no inferior Court is it

justiciable? That question seems, in the language of Story (*On Constn.* § 1705), "to remain to this hour without any authoritative decision." *Railroad Co.* v. *Mississippi* expressly saves the question if the grant of original jurisdiction to the Supreme Court embraces "jurisdiction of all controversies of a civil nature where a State is a party," which Congress has twice declared by the Act of 1789 and § 687 of the Revised Statutes that it did. *Illinois* v. *Illinois* (16 *Fed. Rep.*, 88) followed *Railroad* v. *Mississippi*.

In this connection the language of Taney, *C. J.*, in *Gittings* v. *Crawford* (*supra*), is not inapplicable:

"Again, the laws of Congress, when passed in the exercise of its constitutional powers, are obligatory upon the State Courts, and must be construed by the Courts, and obeyed by them, whenever they come in conflict with the laws of the State. It is true, that the decisions of the State Courts must be subordinate to, and subject to the revision of the Supreme Court of the United States, to whom the ultimate decision of such questions belongs; yet, the State Courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the Courts of the United States has never been held to exclude them."

Federal Incorporations were within the vision of the Framers of the Constitution.

In the report of the Philadelphia Convention of the 17th of September, 1787, is to be found the following:

"Doctor Franklin moved to add, after the words 'post roads,' Article 1, Section 8, a power 'to provide for cutting canals where deemed necessary,' Mr. Wilson seconded the motion. Mr. Sherman objected. The expense in such cases will fall on the United States, and the benefit accrue to the places where the canals may be cut. Mr. Wilson: Instead of being an expense to the United States, they may be made a source of revenues. Mr. Madison suggested an enlargement of the motion into a power 'to grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual States may be incompetent.' His primary object was, however, to secure an easy communication between the States, which the free intercourse now to be opened seemed to call for. The political obstacles being removed, a removal of the natural ones as far as possible ought to follow. Mr. Randolph seconded the proposition. Mr. King thought the power unnecessary. Mr. Wilson: It is necessary to prevent *a State* from

obstructing the *general* welfare. Mr. King: The States will be prejudiced and divided into parties by it. In Philadelphia and New York it will be referred to the establishment of a bank, which has been a subject of contention in those cities. In other places it will be referred to mercantile monopolies. Mr. Wilson mentioned the importance of facilitating by canals the communication with the Western settlements. As to banks, he did not think with Mr. King, that the power in that point of view would excite the prejudices and parties apprehended. As to mercantile monopolies, they are already included in the power to regulate trade. Col. Mason was for limiting the power to the single case of canals. He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution, as supposed by Mr. Wilson. The motion being so modified as to admit a distinct question specifying and limited to the case of canals. Pennsylvania, Virginia, Georgia, aye, 3; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, North Carolina, South Carolina, no, 8. The other part fell of course, as including the power rejected. Mr. Madison and Mr. Pinkney then moved to insert, in the list of powers vested in Congress, a power 'to establish an University in which no preferences or distinctions should be allowed on account of religion.' Mr. Wilson supported the motion. Mr. Gouverneur Morris: It is not necessary. The exclusive power at the seat of government will reach the object. On the question, Pennsylvania Virginia, North Carolina, South Carolina, aye, 4; New Hampshire, Massachusetts, New Jersey, Delaware, Maryland, Georgia, no, 6; Connecticut divided (Doctor Johnson, aye; Mr. Sherman, no)—(3 *Mad. Papers. p.* 1576, *et seq.*).

For these reasons, and for those submitted in the brief upon the facts and the principles of general law, the orders appealed from should be affirmed, and the writs dismissed.

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UNITED STATES CIRCUIT COURT.

North Carolina, 1871.

The Circuit Courts of the United States have not jurisdiction of a case either at law or in equity in which a State is plaintiff against its own citizens. The Constitution of the United States does not confer such jurisdiction, nor is it conferred by any Act of Congress. Such jurisdiction is not conferred upon the Circuit Court in this case by the Bankruptcy Act of eighteen hundred and sixty-seven, because there are other necessary parties than the assignee in bankruptcy, and without such parties the plaintiff could not sustain his suit in any Court.

THE STATE OF NORTH CAROLINA
vs.
TRUSTEES OF UNIVERSITY and C. DEWEY, Assignee, *et al.*

BROOKS, *J.:* The attention of the Court has not been invited to the question of jurisdiction in this case by either the complainant or respondent in their arguments. Yet that is a question to be considered, in the opinion of this Court, and the first properly demanding attention.

All the authority vested in the Courts of the United States to hear and determine causes arising under the provisions of the Constitution of the United States or acts of Congress.

By the provisions of the Constitution the Supreme Court of the United States is established, and its jurisdiction prescribed directly; and it is further provided that Congress shall have power to create or establish inferior courts. Then we think that it necessarily follows that Congress has the power to prescribe the jurisdiction of such Courts. We are sustained in this view by the opinion in the case of *Osborn* v. *The United States Bank* (9 *Wheat.*, 738) and *Sheldon* v. *Gill* (8 *How.*, 448).

The second section of the third article of the Constitution relates to the subjects or classes of cases declared to be within the jurisdiction or power of the United States Courts, and is as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting embassadors; other public ministers and consuls; to all cases of admiralty and maritime

jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens or subjects."

If the framers of our Constitution had proceeded no further, it might be contended, with more reason, that this suit as instituted, comes within the jurisdiction intended to be conferred upon the Circuit Courts. But, as if to leave no doubt upon the subject, they proceeded in the second clause of the second section of the third article to enumerate the classes of cases over which the Supreme Court shall have original jurisdiction, and with these we find all cases affecting embassadors, other public ministers and consuls, and those in which a State shall be a party; and it is further provided, that as to all other subjects included within the jurisdiction prescribed the Supreme Court shall have appellate jurisdiction.

It may be said that though original jurisdiction is by this provision of the Constitution conferred upon the Supreme Court, it is not exclusive, but only concurrent with some other tribunal. We think that a fair construction of the language of the Constitution excludes such a conclusion, and we are happily sustained in this opinion by the opinion of the Court in the case of *Gale* v. *Babcock* (4 *Wash. C. C. Rep.*, 199). It will be seen that in this case it is decided that the Circuit Courts have no jurisdiction of a cause in which a State is a party.

If more authority should be desired upon this point, we refer to the case of *Osborn* v. *The United States Bank* (9 *Wheat.*, 820), in which it is declared that in those cases in which original jurisdiction is conferred upon the Supreme Court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form.

In the case before us, the State of North Carolina is complainant and the only complainant, and it is the character of that party that brings the case within the original jurisdiction prescribed for the Supreme Court, and consequently, according to the opinion of the Court in the case last cited, is excluded from the appellate jurisdiction of that Court.

We hold that it was not intended by any provision of the Constitution or the laws to confer jurisdiction on this Court in any case involving many thousands of dollars (as in this case), without the right to appeal in the event either party should be dissatisfied with the decision of this Court.

Again: In the cases of *Martin* v. *Hunter's Lessee* (1

Wheat., 337,) and *Cohen* v. *Virginia* (6 *Wheat.*, 392), it is decided that in such cases as draw in question the laws, Constitution or treaties of the United States, though a State may be a party, the jurisdiction of the Supreme Court is appellate; for in such a case the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy. Such cases may be taken by appeal or writ of error, from the highest judicial tribunal of a State to the Supreme Court of the United States.

The great American constitutional Judge, in delivering the opinion of the Supreme Court of the United States in *Cohen* v. *The State of Virginia*, before referred to, uses this language:

"It has been also argued as an additional objection to the jurisdiction of the Court that cases between a State and one of its own citizens do not come within the general scope of the Constitution, and were obviously never intended to be made cognizable in the Federal Courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last. This is very true so far as the jurisdiction depends upon the *character* of the parties. If the jurisdiction depended entirely upon the character of the parties, and was not given where the parties had not an original right to come into Court, that part of the second section of the third article which extends the judicial power to all cases arising under the Constitution and the laws of the United States would be mere surplusage. It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union *was not extended to such cases.*"

The ground, as it is seen, that the jurisdiction of this Court is claimed in this case depends upon the character of the parties, and not the character of the subject in controversy.

All we have said, it will be observed, relates more particularly to the provisions of the Constitution, and in regard to the prescribing and the distribution of the judicial power of the United States.

The act of seventeen hundred and eighty-nine, Section 24, is the first whereby Congress undertook to prescribe the jurisdiction of the Circuit Courts, and we find by the seventeenth section of that act that such courts are vested with original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds a certain sum stated, and the United States are plaintiff or petitioner, or an alien is a party, or the suit is between a citizen of the State where a suit is brought and a citizen of another State.

It is quite clear, we think, that the provisions of this Act do not embrace a case in which a State is a party. This question, however, was raised soon after the passage of the Act in the case of *Gale* v. *Babcock*, before referred to, and in this case it was decided so that the Circuit Courts had no jurisdiction between a State and its citizens, or citizens of other States.

It was at one time supposed that the Constitution gave a broader power to the Courts. But it has been long since settled that the civil jurisdiction of the Circuit Courts is governed by the Acts of Congress. (*Turner* v. *Bank of North Carolina*, 4 Dall., 10; *McIntyre* v. *Wood*, 7 Cr., 506; *Kendal* v. *United States*, 12 Pet., 616; *Cary* v. *Curtis*, 3 How., 245.)

But the power to entertain this suit is claimed by counsel for this Court under the provisions of the Bankrupt Act of eighteen hundred and sixty-seven. After a careful examination of the provisions of that Act, we are of opinion that it was not designed to confer, and does not in fact confer such power.

If we could believe that the original jurisdiction conferred by that act upon the Circuit Courts was as full, or equal in all respects to that conferred upon the District Courts, we could not regard it as intending to produce so inevitable a conflict with the provisions of the Constitution before referred to, limiting and restricting, according to our construction, the original jurisdiction in cases in which States are parties to the Supreme Court.

We hold that no such jurisdiction as that contended for in this case was intended to be conferred upon this Court; and further, if it was clearly otherwise, that any attempt to do so on the part of Congress would be ineffectual: for, as has been before seen, the Constitution having itself provided that the jurisdiction in such cases should be original in the Supreme Court, it must be regarded as exclusive of the other Courts of the United States—as much so as if the term *exclusive original jurisdiction* had been employed. And this appears to us to be the view entertained by the Court in the case of *Osborn* v. *The United States Bank*, before cited.

It has been suggested that there is a greater necessity for the exercise of jurisdiction by this Court in this case, because as is insisted by the bankrupt law, the jurisdiction conferred upon the District and Circuit Courts of the United States is exclusive, and that no suit by or against an assignee can be maintained in the State Courts.

We agree that the only jurisdiction *actually conferred* by that Act is with these Courts; but it does not follow that an assignee may not sue or be sued in the State Courts, and, we think that an assignee may sue or be sued in the State Courts.

If we entertained the opinion that all controversies respecting a bankrupt's estate could only be heard and determined in the District or Circuit Courts of the United States, we confess that we would express the view we entertain with much more hesitation than we now feel.

Let the bill be dismissed.

APPENDIX.

The Origin of the Act of June 20, 1874.*

Chapter 331, 18 U. S. Stat. at Large, p. 111, was bill numbered "H. R. No. 3573" in the Forty-third Congress. There was no discussion when the Bill was originally referred to committee. On June 1, 1874, Mr. Wells brought it up as follows (*Con. Rec., pp.* 4434, 4435, *Part V.* 43d *Congress*):

"I am directed by the Committee on the Pacific Railroad to report back a bill (*H. R. No.* 3573) making additions to the Fifteenth Section of the Act approved July 2, 1864, entitled "An Act to Amend an Act, etc." with the recommendation that it do pass."

Mr. Wells: I do not wish to occupy the time of the House with any debate. Most of the members are aware of the difficulties surrounding the operations of the Union Pacific Railroad and its branches. This bill simply carries out the provisions of Section 15 of the organic act authorizing the building of this road.

* * * * * * *

"Mr. Speer: This is in the interest of commerce and cheap transportation."

Having passed the House, the bill was introduced in the Senate on June 16, 1874, by Senator Bogy, who, in so doing, said (*Con. Rec., p.* 5325, *Part VI.* 43d *Congress*):

"I move that the regular business be postponed temporarily with a view to take up a House bill of very great importance, and which will consume very little time and meet with very little opposition. It is House Bill No. 3573."

* * * * * * *

* This is to be read in connection with the Brief upon the facts and principles of general law, and with reference to the capacity of the Kansas Pacific Railway Company to consolidate with the Denver Pacific.

"MR. BOGY: This is not a contest between two railroad companies, as the impression appears to be, but it is a contest between the people of the Western States and these roads. The impression seems to prevail here among members of the body that this is a contest between the Union Pacific branch and the Kansas Pacific branch. In point of fact it is a contest between the people of the West and all these different branches that constitute the great road called the Pacific Railroad, both from Omaha via Ogden to San Francisco, as well as the Kansas City via Denver and Cheyenne to San Francisco.

For example, we in Missouri have built a railroad from the City of Saint Louis to connect with this road at Kansas City, at an expense of twenty odd million dollars. We call it the Missouri Pacific Railroad, because it was intended to go by that route to the Pacific Ocean, forming a connection with the roads created under the law of Congress. By a system of discrimination which has been established on the main line called the Union Pacific, which is the line starting from Omaha on the way to San Francisco via Ogden, the Missouri Pacific Railroad has been rendered useless. A person in Saint Louis desiring to go to San Francisco is compelled to go by the way of Omaha. If he has any freight to send he is compelled to send it by the way of Omaha, although we have built the railroad from Saint Louis to Kansas City at an expense of twenty odd million dollars.

The object of this bill is simply to compel these roads to observe the law of 1862, the law of 1864 and the law of 1866, by which they were to be operated as one continuous road; and as to the expense of operating a railroad on a higher grade, the question cannot arise because they receive subsidies in proportion to the expense of constructing the roads. I state as a fact that cannot be denied that the grades upon the one road are as high as they are upon the other. In other words, the grades upon the Kansas Pacific Railroad are as high as they are upon the main branch called the Union Pacific Railroad. The difference would be very little; but upon those high grades of the Union Pacific Railroad $48,000 in bonds per mile were paid by the Government of the United States, and lands were granted in proportion. An amount of bonds was voted far exceeding the amount necessary for the construction of the road. It was specified in the law that the road should be run without reference to grade and without reference to expense, because that was obviated by the appropriation for building the road as one continuous line. Under that belief we, in Missouri, built what we called the Missouri Pacific Railroad at an enormous expense. The fifteenth section of the act creating the Pacific Railroad reads thus." [*Ch.* 331 *is here set forth word for word*] (*See Congressional Record, p.* 5025. *Vol.* 2, *part* 6, 1874.)

* * * * * * *

"MR. BOGY: One word. Unless there be something of this kind, the Union Pacific and Kansas Pacific Railroads will not respect each other's rights. It is with a view of compelling them. If the law is not in favor of the bill, there can be no danger; but if they have violated the law and thereby made enormous sums of money, there is no reason why they should not be compelled to pay heavy damages. The object of it is to compel them to obey the law, which they will not do otherwise."

* * * * * * *

"MR. SCHURZ: I desire to address one remark to the Senator from Nebraska. It is the object of this act to enforce the Act of Congress which makes all the Pacific Railroad branches one connected and continuous line; and of course this act will have the effect on the Denver road which it will have on the Union Pacific road; that is to say, to pro-rate rates of freight all over these roads. Of course the Denver road cannot be excluded. Under the very act which is here appealed to, the Senator will find his remedy."

Extracts from the Journals of Congress.

Saturday, October 14th, 1775.—The delegates for Connecticut inform the Congress that they had met some of the delegates for Pennsylvania in order to take into consideration the matters referred to them, but not being able to come to any agreement with them, and there being a dispute between the people of the two colonies on the waters of the Susquehanna that proceeded to bloodshed, and in their apprehension might be attended with very serious consequences unless speedily prevented, they moved that a committee be appointed out of the other colonies to take this matter into consideration, and report thereon to the Congress.

Tuesday, October 17th, 1775.—The Congress, taking into consideration the motion made last Saturday by the delegates of Connecticut—*Resolved*, that a committee of five members be appointed to take into consideration the disputes between the people of Connecticut and Pennsylvania, and report what in their opinion is proper to be done by Congress.

December 23d, 1775.—The committee appointed to confer with the Indians made report of their proceedings which was read—

Whereas, the Colony of Connecticut has by certain acts of their assembly resolved that no further settlement be made on the lands disputed between them and Pennsylvania without license from the said assembly—*Resolved*, that it be recommended to the Colony of Connecticut not to introduce any settlers on the said lands until the further order of this Congress, until the said dispute shall be settled.

September 25th, 1776.—That the committee appointed to hear and determine on the appeal against the sentence of condemnation passed upon the schooner Thistle having reversed the decree—*Resolved*, that a passport and safe conduct be granted to Charles Roberts, master of the schooner Thistle, for himself and the said schooner for the space of sixty days.

September 30th, 1776.—A petition from G. Rowe and others, owners of goods on board the ship Elizabeth, which was taken by Captains John Mantley, Daniel Waters and John Ayres, commanders of three armed vessels Hancock, Lee and Lynch, and libelled in the Court Maritime for the State of New Hampshire, and by the sentence of said Court acquitted, against which sentence an appeal has been entered, was laid before Congress and read, praying that the said appeal may be heard and determined. Whereupon, *Resolved*, that a committee of five be appointed with full power to hear and determine on the said appeal. The members chosen—Mr. Paine, Mr. Huntington, Mr. Stone, Mr. Wythe and Mr. Smith.

October 14th, 1776.—The committee appointed to hear and determine upon an appeal brought against the sentence passed on the libel Joshua Wentworth

vs. The Ship Elizabeth reports as follows: * * * * The Committee of Congress, to whom it was referred to hear and determine the said appeal have diligently inspected the proceedings and heard the parties by their counsel, * * * * and that therefore the said sentence is erroneous, and ought to be reversed and annulled * * * * and that the said cause to be sent back to the said Court Maritime, for that Court to proceed in carrying this sentence into execution.

OCTOBER 17th, 1776.—The petition of Henry Keppele was laid before Congress and read, setting forth that he had entered an appeal against the sentence passed on the ship Charming Peggy, and praying that a convenient day might be assigned for hearing the said appeal. *Resolved*, that a committee of five be appointed, with full power to hear and determine upon said appeal.

NOVEMBER 2d, 1776.—An appeal having been lodged with the Secretary against the sentence passed in the Court of Admiralty for the port of Philadelphia in the State of Pennsylvania, on the libel of John Barry *vs.* the Sloop Betsy—*Ordered*, that the hearing and determining on the said appeal be referred to a committee of five.

NOVEMBER 27th, 1776.—An appeal having been lodged against the sentence passed in the Court of Admiralty for the State of Virginia on the libel of Levin Jones *v.* the Sloop Vulcan—*Resolved*, that the hearing and determining the said appeal be referred to Mr. Wythe, &c.

DECEMBER 31st, 1776.—An appeal being lodged against the judgment of the Court of Admiralty for the State of Rhode Island and Providence Plantations, on the libel of Esek Hopkins *v.* Richard Derby—*Ordered*, that it be received, that it may be prosecuted before the Committee on Appeals.

JANUARY 4th, 1777.—*Ordered*, that the hearing and determining upon the appeal against the sentence on the libel of John Craig *v.* Brig Richmond, &c., be referred to the committee appointed on the 27th of November last to hear and determine an appeal.

JANUARY 11th, 1777.—An appeal being lodged against the sentence passed in the Court of Admiralty for the State of Rhode Island on the libel of Job Pierce *vs.* the Brig Phenix—*Ordered*, that the hearing and determining the said appeal be referred to the committee appointed on the 4th instant.

JANUARY 30th, 1777.—*Resolved*, that a standing committee, to consist of five members, be appointed, to hear and determine upon appeals brought against sentences passed on libels in the Courts of Admiralty in the respective States, agreeable to the resolutions of Congress, and that the several appeals when lodged with the Secretary be by him delivered to them for their final determination.

MAY 8th, 1777.—It being represented that the Standing Committee for hearing and determining appeals is too numerous—*Resolved*, that the said committee be discharged and that a new committee of five be appointed, they or any three of them to hear and determine upon appeals brought to Congress. The persons chosen—Mr. Wilson, Mr. Duane, Mr. J. Adams, Mr. Sergeant and Mr. Burke.

AUGUST 20th, 1778.—A letter of July 23d, 1778, from John Warreat, Esquire, of Savannah, in Georgia, was read, accompanied with an appeal from the judgment of a Court of Admiralty on the libel against the armed brig Hinchenbrook—*Ordered*, that the same be referred to the Committee on Appeals.

SEPTEMBER 21st, 1778.—An appeal from the judgment of a Court of Admiralty for the State of New Jersey on the libel of Timothy Shaler *vs.* the Sloop Speedwell, was lodged with the Secretary, and referred to the Committee on Appeals.

OCTOBER 9th, 1778.—A petition from Elisha Doane was made, accompanied with the proceedings of a Court of Admiralty in the State of New Hampshire on the libel of Tradewell & Penhallow *v.* the Brig Lusanna, &c., praying that an appeal to Congress may be allowed. *Ordered*, that the same be referred to the Committee on Appeals.

OCTOBER 12th, 1778.—An appeal from a jndgment of a Court of Admiralty for the State of Delaware on the libel of Thomas Goodwin, &c., *vs.* the Schooner Fortune was lodged with the Secretary.

OCTOBER 13th, 1778.—An appeal from the judgment of a Court of Admiralty for the State of Delaware on the libel of Daniel Murty *v.* the Sloop Hawk, &c., was lodged with the Secretary.

OCTOBER 20th, 1778.—An appeal from the judgment of a Court of Admiralty for the State of Pennsylvania on the libel of Elverton Taylor *vs.* the Sloop Polly was lodged with the Secretary, and referred to the Committee on Appeals.

Also an appeal from the judgment of a Court of Admiralty for the State of Rhode Island and Providence Plantations on the libel of Charles Jenks, &c., *vs.* the Sloop Fannie, was lodged with the Secretary, at his chamber, on the 16th, and referred to the Committee on Appeals.

OCTOBER 23d, 1778.—An appeal from the judgment of a Court of Admiralty for the State of New Jersey on the libel of David Stephen, &c., *vs.* the Schooner John and Sally, was lodged, and referred to the Committee on Appeals.

OCTOBER 26th, 1778.—An appeal from the judgment of a Court of Admiralty for the State of Rhode Island on the libel of Jonathan Tradewell, &c., *vs.* the Schooner Hawk was lodged, and referred to the Committee on Appeals.

SATURDAY, March 6th, 1779.—The committee, consisting of Mr. Floyd, Mr. Ellery and Mr. Burke, to whom was referred the report of the Committee on Appeals of Jan. 19, 1779, having in pursuance of the instructions to them given, examined into the causes of the refusal of the Judge of the Court of Admiralty for the State of Pennsylvania to carry into execution the decree of the Court or Committee of Appeals, report: "That, on a libel in the Court of Admiralty for the State of Pennsylvania in the case of the sloop Active, the jury found a verdict in the following words, viz.: 'One-fourth of the net proceeds of the sloop Active and her cargo to the first claimants, three-fourths of the net proceeds of the said sloop and cargo to the libellant and the second claimant, as per agreement between them;' which verdict was confirmed by the Judge of the Court, and sentence passed thereon. From this sentence, or judgment and verdict, an appeal was lodged with the Secretary of Congress, and referred to the committee appointed by Congress, 'to hear and determine finally upon all appeals brought to Congress' from the Courts of Admiralty of the several States.

That the said committee, after solemn argument, and full hearing of the parties by their advocates, and taking time to consider thereof, proceeded to the publication of their definitive sentence or decree, thereby reversing the sentence of the Court of Admiralty, making a new decree, and ordering process to issue out of the Court of Admiralty for the State of Pennsylvania to carry this their decree into execution.

That the Judge of the Court of Admiralty refused to carry into execution the decree of the said Committee on Appeals, and has assigned, as the reason of his refusal, that an act of the Legislature of the said State has declared that the finding of a jury shall establish the facts in all trials in the Courts of Admiralty, without re-examination or appeal, and that an appeal is permitted only from the decree of the Judge.

That having examined the said act, which is entitled 'An act for establishing a Court of Admiralty,' passed at a session which commenced on the 4th of August 1778, the committee find the following words, viz.: 'the finding of the jury shall establish the facts without re-examination or appeal,' and in the seventh section of the same act the following words, viz.: 'in all cases of captures an appeal from the decree of the Judge of Admiralty of this State shall be allowed to the Continental Congress, or such person or persons as they may from time to time appoint for hearing and trying apepals.'

That although Congress by their resolution of November 25th, 1775, recommended it to the several Legislatures to erect courts for the purpose of determining concerning captures, and to provide that all trials in such cases be had by a jury, yet it is provided that in all cases an appeal shall be allowed to Congress or to such person or persons as they shall appoint for the trials of appeals.

Whereupon, *Resolved*, That Congress, or such person or persons as they

appoint to hear and determine appeals from the courts of admiralty have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any court of admiralty or court for determining the legality of captures on the high seas can or ought to destroy the right of appeal, and the re-examination of the facts reserved to Congress;

That no act of any one State can or ought to destroy the right of appeals to Congress in the sense above declared;

That Congress is by these United States invested with the supreme sovereign power of war and peace;

That the power of executing the law of nations is essential to the sovereign supreme power of war and peace;

That the legality of all captures on the high seas must be determined by the law of nations;

That the authority ultimately and finally to decide on all matters and questions touching the law of nations does reside and is vested in the sovereign supreme power of war and peace;

That a control by appeal is necessary in order to compel a just and uniform execution of the law of nations;

That the said control must extend as well over the decisions of juries as judges in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might at any time exercise the same in such manner as to prevent a possibility of being controlled; a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace entrusted to Congress and would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties, or other breaches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities; a construction which, for these and many other reasons, is inadmissible;

That this power of controlling by appeal the several admiralty jurisdictions of the States has hitherto been exercised by Congress by the medium of a committee of their own members;

Resolved, That the committee before whom was determined the appeal from the court of admiralty for the State of Pennsylvania in the case of the Sloop Active was duly constituted and authorized to determine the same.

On passing this resolution, the yeas and nays being required by Mr. Searle, it was resolved in the affirmative.

Resolved, That the said committee had competent jurisdiction to make thereon a final decree, and, therefore, their decree ought to be carried into execution.

On the yeas and nays being required by Mr. Searle, it was resolved in the affirmative.

Resolved, That the general assembly of the State of Pennsylvania be requested to appoint a committee to confer with a committee of Congress on the subject of the proceedings relative to the Sloop Active, and the objections made to the execution of the decree of the committee on appeals, to the end that proper

measures may be adopted for removing the said obstacles; and that a committee of three be appointed to hold the said conference with a committee of the general assembly of Pennsylvania.

The members chosen—Mr. Paca, Mr. Burke and Mr. R. H. Lee.

TUESDAY, March 9th, 1779.—*Resolved*, That two members be elected for the standing committee for hearing and finally determining on appeals brought to Congress to be added to Mr. Drayton, Mr. Ellery and Mr. Henry, the present members of the said committee.

The members chosen—Mr. Root and Mr. Paca.

SATURDAY, May 22d, 1779.—*Resolved*, That the resolutions of Congress, passed on the 6th day of March last, relative to the control of Congress by appeal in the last resort over all jurisdiction for deciding the legality of captures on the high seas, be immediately transmitted to the several States; and that they be respectively requested to take effectual measures for conforming therewith.

SATURDAY. May 22d, 1779.—The delegates of New York, in behalf of their State, moved that Congress come to the following resolutions:

Resolved, That it be recommended to the inhabitants of the said pretended State of Vermont to return peaceably to their former jurisdictions, that is to say, those who have separated from the State N. York to the State of N. York, and those who have separated from the State of New-Hampshire to the State of New-Hampshire.

Resolved, That Congress will readily hear, examine and interpose to obtain a redress of any grievances of which the said inhabitants may have cause to complain against their said respective States.

FRIDAY, September 24th, 1779.—*Resolved unanimously*, That it be and hereby is most earnestly recommended to the States of New Hampshire, Massachusetts Bay and New York, forthwith to pass laws expressly authorizing Congress to hear and determine all differences between them relative to their respective boundaries in the mode prescribed by the articles of confederation, so that Congress may proceed thereon by the first day of February next at the farthest; and further, that the said States of New-Hampshire, Massachusetts-Bay and New York, do, by express laws for the purpose, refer to the decision of Congress all differences or disputes relative to jurisdiction which they may respectively have with the people of the district aforesaid, so that Congress may proceed thereon on the first day of February next, and also to authorize Congress to proceed to hear and determine all disputes subsisting between the grantees of the several States aforesaid with one another, or with either of the said States respecting title to lands lying in the said district, to be heard and determined in the mode prescribed for such cases by the articles of confederation aforesaid; and further, to provide that no advantage be taken of the non-performance of the conditions of any of the grants of the said lands, but that further reasonable time be allowed for fulfilling such conditions.

SATURDAY, January 15th, 1780.—*Resolved*, That a court be established for the trial of all appeals from the courts of admiralty in these United States in cases of capture, to consist of three judges, appointed and commissioned by Congress, either two of whom in the absence of the other to hold the said court for the dispatch of business: That the said court appoint their own Register: That the trials therein be according to the usage of nations, and not by jury: That the said judges hold their first session as soon as may be at Philadelphia, and afterwards at such times and places as they shall judge most conducive to the public good, so that they do not at any time sit further eastward than Hartford in Connecticut, or southward than Williamsburgh in Virginia: That the salary of the said judges be fixed on the first Monday in July next, and that in the interim the sum of 12,000 dollars be advanced to each of them.

Resolved, That Saturday next be assigned for electing the judges of the court of appeals, and that in the meanwhile nominations be made.

SATURDAY, January 22d, 1780.—Congress proceeded to the election of judges of the court of appeals, and the ballots being taken, the president informed Congress that Mr. Wythe, Mr. Paca and Mr. Hosmer were duly elected—Mr. Hosmer and Mr. Paca having an equal number of votes.

MONDAY, March 13th, 1780.—A letter of February 21st from G. Wythe was read, declining the office of judge of the court of appeals.

FRIDAY, April 28th, 1780.—Congress proceeded to the election of a judge of the court of appeals in the room of Mr. Wythe, and the ballots being taken, Mr. Cyrus Griffin was elected, having been previously nominated by Mr. Jones.

THURSDAY, May 4th, 1780.—A letter of April 12th from T. Hosmer was read acquainting Congress of his acceptance of the office of judge of the court of appeals to which they have been pleased to appoint him. A letter of this day from C. Griffin was read expressing his thanks for the confidence reposed in his integrity and abilities by appointing him one of the judges of the court of appeals, and informing, that, as he is delegated by the State of Virginia to a different employment, he does not think himself justifiable in a peremptory acceptation of the office without the approbation of his constituents; but that, in the meanwhile, if Congress shall think proper, he will undertake the business of a judge, and endeavor to pay that attention which so important a commission may require.

WEDNESDAY, May 24th, 1780.—*Resolved*, That the style of the court of appeals appointed by Congress be "The Court of Appeals in cases of Capture."

Resolved, That the judges and register of the said court shall respectively take an oath of office before they enter upon the duties of the same. That the

oath of the judges be in the words following, viz.: "You do swear, or affirm, that you will well, faithfully and impartially execute the office of one of the judges of the court of appeals in cases of capture, according to the best of your skill and judgment. So help you God." That the oath of the register of the said court shall be in the words following: "You do swear, or affirm, that you will well and faithfully execute the office of register of the court of appeals in cases of capture, according to the best of your skill and judgment. So help you God."

That the judges of the said court shall be qualified in the manner aforesaid before the President of Congress, and certificates thereof lodged in the office of the Secretary of Congress; and that the register shall be qualified before the said judges, and certificate thereof lodged in the said Court of Appeals.

Resolved, That appeals from the courts of admiralty, in the respective States be, as heretofore demanded, within five days after definitive sentence; and in future, such appeals be lodged with the register of the Court of Appeals, in cases of capture within forty days thereafter, provided the party appealing shall give security to prosecute such appeal to effect.

Resolved, That all matters respecting appeals in cases of capture, now depending before Congress, or the commissioners of appeals, consisting of members of Congress, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law; and that all papers touching appeals in cases of capture, lodged in the office of the Secretary of Congress, be delivered to and lodged with the register of the Court of Appeals.

FRIDAY, June 2d, 1780.—Congress resumed the consideration of the report of the committee on sundry papers respecting the New Hampshire Grants, and thereupon came to the following resolutions:

Whereas, It is represented to Congress, and, by authentic evidence laid before them, it appears that the people inhabiting the district of country commonly known by the name of the New Hampshire Grants, and claiming to be an independent State, have, notwithstanding the resolutions of Congress of the 24th September, and 2d of October, proceeded as a separate government to make grants of lands, and sales of estates by them declared forfeited and confiscated, and have also in divers instances exercised civil and military authority over the persons and effects of sundry inhabitants within the said district, who profess themselves to be citizens of and to owe allegiance to the State of New York.

Resolved, That the acts and proceedings of the people inhabiting the said district, and claiming to be an independent State, as aforesaid, in contravening the good intentions of the said resolutions of the 24th of September and the 2d of October last are highly unwarrantable, andsubversive of the peace and welfare of the United States. That the people inhabiting the said district, and claiming to be an independent State, as aforesaid, be and they hereby are strictly required to forbear and abstain from all acts of authority, civil or military, over the inhabitants of any town or district who hold themselves to be subjects of, and to owe allegiance to, any of the States claiming the jurisdiction of the said territory, in whole or in part, until the decisions and determinations in the resolution aforementioned shall be made.

And whereas, the States of New Hampshire and New York have complied with the said resolutions of the 24th of September and the 2d of October last, and by their agents and delegates to Congress, declared themselves ready to proceed in supporting their respective rights to the jurisdiction of the district aforesaid, in whole or in part, according to their several claims, and in the mode prescribed in the said resolutions; and whereas, Congress by their order of the 24th of March last did postpone the consideration of the subject of the said resolutions, nine States exclusive of those who were parties to the question not being represented; and by their order of the 17th of May last have directed that letters be written to the States not represented, requesting them immediately to send forward a representation.

Resolved, That Congress will, as soon as nine States, exclusive of those who are parties to the controversy, shall be represented, proceed to hear and examine into and finally determine the disputes and differences relative to jurisdiction between the three States of New Hampshire, Massachusetts-Bay and New York respectively, or such of them as shall have passed such laws as are mentioned in the said resolutions of the 24th of September and the 2d of October last, on the one part, and the people of the district aforesaid, who claim to be a separate jurisdiction on the other, in the mode prescribed in and by the said resolutions.

WEDNESDAY, September 13th, 1780.—*Resolved*, That the officers and others undermentioned be allowed by the year the sums following, that is to say: Judges of the court of appeals in cases of capture, each, 2,250 dollars.

TUESDAY, September 12th, 1780.—*Resolved*, That the order of the day to proceed to hear and examine into and finally determine the disputes and differences relative to jurisdiction between the three States of New Hampshire, Massachusetts-Bay and New York respectively, or such of them as shall have passed such laws as are mentioned in the resolutions of the 24th of September and the 2d of October last, on the one part, and the people of the district, commonly known by the name of the New Hampshire Grants, who claim to be a separate jurisdiction, on the other, in the mode prescribed in and by the said resolutions, be postponed till Thursday next, and that the members in town be notified to attend the house at 10 o'clock in the morning of that day.

WEDNESDAY, July 18th, 1781.—The consideration of the ordinance for establishing a court of appeals in cases of capture was resumed and, after debate—*Ordered*, that it be recommitted—that Mr. Randolph be added to the committee.

Resolved, That it be an instruction to the said committee to prepare and bring in an ordinance for regulating the proceedings of the admiralty courts of the several States in cases of capture, to revise and collect in one body the resolutions of Congress and other convenient rules of decision, and to call upon the several Legislatures to aid by necessary provisions the powers reserved to Congress by the articles of confederation on the subject of captures from the enemy.

MONDAY, February 11th, 1782.—On a report of a committee to whom was referred a memorial praying, for reasons therein specially set forth, that their appeal against the sentence of the courts of admiralty in the State of Connecticut may be received.—*Resolved*, that the court of appeals be and hereby is authorized to hear the parties on the subject of the said memorial, and to do what shall thereupon appear to the said Court just and right, the act of the 24th day of May, 1780, notwithstanding.

MONDAY, August 12th, 1782.—In pursuance of the resolution of the 16th day of July last, the agents for the commonwealth of Pennsylvania and for Connecticut made report as follows :

"To the Honorable the Congress of the United States of America : We, the underwritten agents on the part of the commonwealth of Pennsylvania and of the State of Connecticut, do humbly certify that, in pursuance of the resolution of Congress, bearing date the 16th day of July last, we have met and conferred together, and by joint consent have appointed the following gentlemen as commissioners to constitute a court for hearing and determining the matter in question between the said States, that is to say, the hon. William Whipple, Esq., of New Hampshire, the hon. major-general Nathaniel Greene of Rhode Island, the hon. David Brearley and William Churchill Houston, Esqs., of New Jersey, the hon. Cyrus Griffin and Joseph Jones, Esqs., of Virginia, and the hon. John Rutledge, Esq., of South Carolina, any five or more of whom we have agreed shall constitute a court, and have authority to proceed and determine the matter and difference between the said States. At the same time, we beg leave most humbly to request that Congress will be pleased to determine how much shall be allowed to the said commissioners as a compensation for their services and also in what manner and by whom they shall be paid. Dated the 8th of August in the year of our Lord, 1782, and in the 7th year of our independence.

Signed, WILLIAM BRADFORD, JUN., JOSEPH REED, JONATHAN D. SERGEANT, H. OSBORNE, *Agents for Pennsylvania.*
ELIPHALET DYER, JESSE ROOT, *Agents for Connecticut.*

FRIDAY, August 23d, 1782.—The agents for the commonwealth of Pennsylvania and the State of Connecticut represent to the United States in Congress assembled, as follows : "That having met and conferred together and being informed that there is not any reason to hope for the attendance of Major-General Greene as one of the commissioners for determining the dispute subsisting between us, and that the hon. John Rutledge has declined serving, we have mutually appointed the hon. Thomas Nelson, Esq., of Virginia, and Welcome Arnold, Esq., of Rhode Island, as commissioners in their stead, and we do pray that they, together with the other five, may be commissioned for that purpose. Dated the 21st of August, 1782.

Signed, WILLIAM BRADFORD, JUN., JOSEPH REED, JAMES WILSON, JONATHAN D. SERGEANT, *Agents for Pennsylvania.*
ELIPHALET DYER, JESSE ROOT, *Agents for Connecticut.*

The said agents also laid before Congress the following instrument of agreement:

"It is agreed between the agents for the commonwealth of Pennsylvania and the State of Connecticut that Congress be requested to approve the appointment by the said agents of the hon. William Whipple, Welcome Arnold, David Brearley, William Churchill Houston, Cyrus Griffin, Joseph Jones and Thomas Nelson, Esqrs., and to constitute them, or any five or more of them, a court of commissioners to hear and finally determine the dispute between the said States, relative to their respective claims and possessions, agreeably to the 9th article of the confederation; and that a commission be made out for them under the seal of the United States, and signed by the president of Congress; that each commissioner be allowed ten dollars a day for the time he shall be employed in the said business for his services and expenses, to be paid in the first instance, one-half by the State of Pennsylvania and one-half by the State of Connecticut; that the commissioners, or any five or more of them, do meet at Trenton, in New Jersey, on Tuesday the 12th day of November next, and have power to adjourn from time to time and place to place, as they shall judge it necessary, until they shall make a final decision in the said cause; and that a copy of their resolutions be transmitted to each of the said commissioners, and their attendance on the said business requested. Dated, 21st August, 1782.

Signed, WILLIAM BRADFORD, JUN., JAMES WILSON, JOSEPH REED, JONATHAN D. SERGEANT, ELIPHALET DYER, JESSE ROOT.

Whereupon, *Ordered*, That the secretary prepare and report the draught of a commission for the said William Whipple, Welcome Arnold, David Brearley, William Churchill Houston, Cyrus Griffin, Joseph Jones and Thomas Nelson, or any five or more of them, as commissioners or judges nominated by the States of Pennsylvania and Connecticut to determine the dispute between the said States agreeably to the 9th article of the confederation.

THURSDAY, January 8th, 1784.—On the report of a committee to whom was referred a memorial of Jan Hendrick Christian Heinekin, one of the agents of the Prussian ship Minerva, touching a decree of the court of appeals in cases of capture: *Resolved*, That the memorial of Jan Hendrick Christian Heinekin, with the papers accompanying it, be referred to the judges of the court of appeals in cases of capture, to report to Congress as speedily as may be the proceedings, proofs and judgments in the above mentioned cause.

TUESDAY, January 13, 1784.—The committee, consisting of Mr. Ellery, Mr. Hand, Mr. Spaight, Mr. Jefferson and Mr. Lee, to whom was referred a letter of the 6th of November from the Legislature of New-Hampshire on the subject of a memorial from the owners of the private armed vessel called the Brig McClary, respecting the proceedings and sentence of the judges of the court of appeals in cases of capture, in the case of the Brig Lusannah captured by the said private armed vessel called the Brigantine McClary, together with a letter from Mr. J Sullivan, agent for the proprietors of the said Brig McClary, having made a report, and the said report after debate being post-

poned, a motion was made by Mr. Gerry, seconded by Mr. Osgood, That the further consideration of the report be postponed to the 1st Monday of April next, and that a copy of the memorial be transmitted to the present claimants of the Brig Lusannah to show cause if any they have why the prayer of the said memorial should not be granted, and in the meantime all proceedings in the sentence of the court of appeals touching the premises ought to be stayed.

WEDNESDAY, January 21st, 1784.—The committee, consisting of Mr. Ellery, Mr. Hand, Mr. Spaight, Mr. Jefferson and Mr. Lee, to whom was referred a letter of the 6th November from the Legislature of New Hampshire respecting the proceedings and sentence of the court of appeals in cases of capture on the case of the ship Lusannah, having delivered in a report, the same was called for: whereupon, a motion was made by Mr. Howell, seconded by Mr. Ellery, that the report be postponed until the State of New Hampshire whose interests are thereby materially affected shall be represented in Congress. The report being as follows: "Your committee find that, by a resolution of Congress of November 25, 1775, it was recommended to the Legislatures of the several States to erect courts for determining the cases of captures from the enemy on the high seas; and it was declared that in all cases an appeal should be allowed to Congress or such persons as they should appoint for the trial of appeals.

That this resolution was complied with by the several States, some of them ceding appeals to Congress on a larger and some on a more contracted scale; and New Hampshire particularly by their act of assembly of 1776 allowing them only in cases of captures by armed vessels fitted out at the charge of the United States, and reserving the appeal in all other cases to the supreme court of their own State. That the course of Congress was to appoint a committee for the trial of every special appeal till the 30th day of January, 1777, when a standing committee was appointed to hear and determine appeals from the courts of admiralty in the respective States. That the Brigantine McClary, a private armed vessel owned by John Penhallow and others, citizens of New Hampshire, captured on the high seas, in the month of November, 1777, the Brigantine Lusannah the subject of the present question, carried her into Piscataqua in the State of New Hampshire, and libelled her before the maritime court of the said State, whereon the said vessel and cargo were by the said court condemned.

That the claimants, Elisha Doane and others, prayed an appeal to Congress, which being refused, they appealed to the Superior Court of New Hampshire, where, the sentence being confirmed, they again prayed an appeal to Congress, which was refused, and the sentence carried into effect by a sale and distribution of the vessel and cargo.

That on the 9th day of October, 1778, the said Elisha Doane petitioned Congress for a revision of the said sentence, which petition being referred to the Committee of Appeals, they, in May, 1779, summoned the libellants to appear before them in defense of their right.

That on the 22d of the same month Congress resolved that certain resolutions of theirs of March 6, 1779, relative to their control over all jurisdictions in

cases of capture on the high seas, should be transmitted to the several States, and they be respectively requested to take effectual measures for conforming therewith. That they were accordingly transmitted to the State of New Hampshire, the Legislature whereof, by their act of November, 1779, extended the license of appeals to Congress to every case wherein any subject of any foreign nation in amity with the United States should be interested in the dispute, and allowed it no further. That in May, 1780, a Court of Appeals was established by Congress, with jurisdiction over all matters respecting appeals in cases of capture then depending before Congress or the Commissioners of Appeals, consisting of Members of Congress. That all these transactions were prior to the completion of the confederation, which took place on the 1st of March, 1781. That on the 17th of September, 1783, the Court of Appeals proceeded to consider the case of the said Elisha Doane and others against the brigantine Lusannah, John Penhallow, libellant, and to reverse the said sentence passed by the inferior and superior courts of New Hampshire, whereupon your committee have come to the following resolution :

Resolved, That the said capture having been made by citizens of New Hampshire, carried in and submitted to the jurisdiction of that State before the completion of the confederation, while appeals to Congress in such cases were absolutely refused by their Legislature, neither Congress, nor any person deriving authority from them, had jurisdiction in the said case.

On the question for postponing as above, the yeas and nays being required by Mr. Foster, it passed in the negative.

After further debate on the report an adjournment was called for and agreed to.

FRIDAY, January 23, 1784.—On the report of a committee consisting of Mr. Jefferson, Mr. Lee and Mr. Williamson, to whom was referred a petition of Zebulon Butler and others, claiming under the State of Connecticut, private right of soil within the territory westward of the Delaware, formerly in controversy between the said State and that of Pennsylvania, and lately determined by a court constituted and appointed agreeably to the ninth of the articles of confederation and perpetual union, to be within the jurisdiction of the State of Pennsylvania, complaining that they are disturbed in their right by others claiming under the said State of Pennsylvania, and praying that a court may be instituted under the ninth article of the confederation for determining the said right.

Resolved, That a court be instituted according the said ninth article of the confederation for determining the private right of soil within the said territory, so far as the same is by the said article submitted to the determination of such a court; that the fourth Monday in June next be assigned for the appearance of the parties by their lawful agents before Congress or the Committee of the States wheresoever they shall be then sitting; that notice of the assignment of the said day be given to the parties in the following form :

"To the claimants of the private right of soil within the territory westward of the Delaware, heretofore in controversy between the States of Connecticut and Pennsylvania, and adjudged by the sentence of a court constituted and appointed agreeably to the ninth of the articles of confederation and perpetual

union to be within the jurisdiction of the State of Pennsylvania, it is hereby made known: That sundry individuals claiming private right of soil under the State of Connecticut within the said territory have made application to Congress, stating that they have been disturbed in their said right of soil by others claiming under the State of Pennsylvania, and praying for the institution of a court for determining the said private right of soil in pursuance of the ninth article of confederation; and that the fourth Monday in June next is assigned for the appearance of the parties by the lawful agents before Congress, or a committee of the States, wheresover they shall be then sitting, to proceed in the premises as by the confederation is directed. By order of Congress, Charles Thompson, Secretary."

Resolved, That the said notice be transmitted by the secretary to the executives of the States of Connecticut and Pennsylvania, with a request that they take proper measures for having the same served on the parties interested under their States respectively.

THURSDAY, June 3, 1784.—On the report of a committee, consisting of Mr. Stone, Mr. Read, Mr. Munroe, Mr. Williamson and Mr. Sherman, to whom was referred a petition from the Legislature of the Commonwealth of Massachusetts, praying that a federal court may be appointed by Congress to decide a dispute between the said commonwealth and the State of New York:

Resolved, That the first Monday in December next be assigned for the appearance of the said States of Massachusetts and New York by their lawful agents, at the place in which Congress shall then be sitting.

Resolved, That the form of the notice be as follows, to be transmitted by the secretary, agreeably to the articles of confederation:

"By the United States in Congress assembled, in the City of Annapolis, on the third day of June, in the year of our Lord, 1784, and in the eighth year of the independence of the United States of America:

To the legislative authority of the State of New York:

It is hereby made known that, pursuant to the 9th of the articles of confederation and perpetual union, the Legislature of the commonwealth of Massachusetts have presented a petition to Congress in the words following:

'To the United States in Congress assembled, the petition of the Legislature of the Commonwealth of Massachusetts showeth, that whereas James the First, late King of Great Britain, by his letters patent, bearing date at Westminister, the 3d day of November, in the 18th year of his reign, granted under the council established at Plimouth, in the County of Devon, and Kingdom of Great Britain, commonly called the council for planting, ruling and ordering and governing of New England in America, all that part of America, lying and being in breadth from 40 to 48 degrees of northerly latitude, and of length of and within all the breadth aforesaid, throughout the main lands, from sea to sea, to hold the same to themselves, their successors and assigns forever. And whereas, the said council established at Plimouth, by their deed, indented under their seal, dated the 19th day of March, in the 3d year of the reign of Charles the First, late King of Great Britain, did bargain, sell enfeoff, alien and confirm unto Sir Henry Roswell, and his associates, and to their heirs and assigns, all that part of New England, in America, which lyeth and extendeth between

a great river called Merrimac, and a certain other river there called Charles river, being the bottom of a bay there, called Massachusetts-Bay, and also all those lands lying within 3 English miles to the southward of the southernmost part of the said bay, and extending thence northward, in latitude to the northward of every part of the said river Merrimac, and in breadth of latitude aforesaid extending throughout all the main land, in longitude westwardly to the southern ocean. And the said Legislature in their claim herein described, do aver, that the point or place situate 3 miles south of the bay, called Massachusetts-Bay, is a point or place situate in 42 degrees of northern latitude, 2 minutes north; and that the place, point or boundary aforesaid, of 3 miles to the northward of every part of the river Merrimac, is a place or point situate in 44 degrees northern latitude, 15 minutes north; and that by the grant aforesaid, the said Sir Henry Roswell and his associates, became seized of all the lands before described and contained in the grant aforesaid, of the said council established at Plimouth; and that the same grant was confirmed to the said Henry Roswell and his associates, by the said King Charles, by his letters patent, dated in the 4th year of his reign; and that the said Sir Henry Roswell and his associates, were, immediately upon making the grant aforesaid by the said council, in the actual seizen and possession of all the lands aforesaid, and for many years held the same under the name and title of the governor and company of Massachusetts-Bay, in New-England. And that such proceedings and possessions have been done and had respecting the territory aforesaid, granted to the said Sir Henry Roswell and his associates, and such subsequent grants have been made of the same, that all the said territory is now the just and proper right of the commonwealth aforesaid. And all this the said Legislature are ready to verify.

And whereas the State of New York have set up a claim to some part of the land before mentioned, and it being highly necessary to have the same claims brought to an immediate decision, they do therefore in behalf of the said commonwealth, most solemnly request the United States of America in Congress assembled, that commissioners may be appointed for enquiring into and determining upon the claim aforesaid of the said Legislature, and that such other proceedings respecting the premises may be had, as are by the federal government of the said United States in such cases made and provided.

And that the first Monday in December next is assigned for the appearance of the said States of Massachusetts and New York, by their lawful agents, at the place in which Congress shall then sit, to proceed in the premises as by the said articles of confederation and perpetual union is directed.

By order of Congress.

CHARLES THOMSON,
Sec'y."

FRIDAY, December 10th, 1784.—According to order the agents for the State of Massachusetts and New York attended and informed the United States in Congress assembled that they have respectively been furnished with the credentials of the other party, and have no objections thereto; whereupon,

Resolved, That the agents for the States of Massachusetts and New York be and they are hereby directed to appoint by joint consent commissioners or

judges to constitute a Court for hearing and determining the matter in question, agreeable to the 9th of the articles of confederation and perpetual union.

FRIDAY, December 24th, 1784.—In pursuance of the resolution of the 10th day of this present month, December, the agents for the States of Massachusetts and New York made report as follows:

"To the United States in Congress assembled:

We, the underwritten agents of the Commonwealth of Massachusetts and the State of New York, do hereby certify that, in pursuance of the pleasure of Congress to us signified on the 17th day of December instant, we have agreed on the following gentlemen as commissioners to constitute a court for hearing and determining a dispute or controversy now subsisting between the said States, as set forth in the petition of the said commonwealth now on the files of Congress, that is to say: the hon. Robert Hanson Harrison, Esq., of the State of Maryland; the hon. Thomas Johnson, Esq., of the said State; the hon. John Rutledge, Esq., of the State of South Carolina; the hon. George Wythe, Esq., of the State of Virginia; the hon. William Grayson, Esq., of the said State; the hon. James Monroe, Esq., of the said State; the hon. George Read, Esq., of the State of Delaware; the hon. Isaac Smith, Esq., of the State of New Jersey; and the hon. William Patterson, Esq., of the said State. And we the said agents do further certify that it is mutually agreed between the parties that, if any one or more of the gentlemen so named as commissioners shall decline the said office, the vacancy shall be supplied by Congress according to an agreement in writing of this date signed and interchanged by us the said agents. And further that any five of the said commissioners who shall finally accept the said office shall be a quorum, according to the confederation of the United States. And we do further humbly certify that it is also mutually agreed between us that the Court for determining the said controversy shall be holden at such place as Congress by a vote of the majority of the States to be assembled when the place for holding the said Court is considered shall appoint. Dated at Trenton, this 24th December, 1784.

JOHN LOWELL, JAMES SULLIVAN, E. GERRY, S. HOLTEN, GEO. PARTRIDGE, RUF. KING,

Agents for Massachusetts.

JAS. DUANE, R. R. LIVINGSTON, WALTER LIVINGSTON, EGBT. BENSON,

Agents for New York.

THURSDAY, June 9, 1785.—In further pursuance of the resolution of the 10th day of December last, the agents of the States of New York and Massachusetts made the following report:

"To the honorable the United States in Congress assembled: The subscribers, agents for the States of New York and Massachusetts, beg leave to represent that they have agreed upon the hon. Samuel Johnson, Esq., of North Carolina, the hon. William Fleming, Esq., of Virginia, and the hon. John Sitgreaves, Esq., of North Carolina, to be judges, instead of the hon. John Rutledge, Robert Hanson Harrison, and William Grayson, Esqrs., who have

declined their appointment, to sit in the federal court for a trial of a controversy between the said States of Massachusetts and New York, which controversy is suggested in the petition of the former, now on the files of Congress, and thereupon the said agents do humbly request that notice may be given to the said Samuel Johnson, William Fleming, and John Sitgreaves, Esqrs., and that, upon their acceptance, a commission may be issued to them, together with the hon. Thomas Johnson, George Wythe, George Reed, James Munroe, Isaac Smith and William Patterson, Esqrs., constituting them a court according to the confederation, to meet at the City of Williamsburg, in the State of Virginia, on the 3d Tuesday of November next, to hear and determine the controversy aforesaid.

JOHN JAY, ROB. R. LIVINGSTON, WALTER LIVINGSTON,
Agents for New York.

J. LOWELL, JAMES SULLIVAN, THEOP. PARSONS, RUFUS KING, S. HOLTEN,
Agents for Massachusetts.

WEDNESDAY, November 2, 1785.—The agents for the States of Massachusetts and New York represented to Congress as follows:

"To the honorable the United States in Congress assembled: The agents of the States of Massachusetts and New York, whose names are subscribed, beg leave to represent, That such have been the difficulties and delays in obtaining answers from several of the judges chosen to determine the controversy between the said States, that they are left in suspense even to this hour; a circumstance which hath hitherto prevented a hearing, and renders farther procrastination unavoidable. Wherefore, it is prayed, in behalf of the said States, that the hearing of the said controversy may be on such future day as the parties shall mutually agree upon, and hereafter certify to Congress, and at the place appointed for that purpose by their act of the 9th day of June last.

JAMES DUANE, JOHN JAY,
Agents for New York.
E. GERRY, RUFUS KING, S. HOLTEN,
Agents for Massachusetts.

New York, Nov. 1, 1785.

Whereupon, *Resolved*, That the court for determining the controversy aforesaid be held at the city of Williamsburgh in the State of Virginia upon such future day as the parties by their lawful agents shall mutually agree upon and hereafter certify to Congress, or, in case of their disagreement, upon such day as may be appointed by Congress on the application of either party.

WEDNESDAY, June 1, 1875.—On the report of a committee consisting of Mr. King, Mr. Lawrence, Mr. J. Henry, Mr Ellery and Mr. Monroe, to whom was referred a petition of the legislature of the State of South Carolina, praying that a federal court may be appointed conformably to the articles of confederation and perpetual union, to decide a dispute concerning boundaries between the said State and the State of Georgia.

Resolved, that the second Monday in May next be assigned for the appearance of the States of South Carolina and Georgia by their lawful agents, and that notice thereof and of the petition of the legislature of the State of South Carolina be given by the secretary of Congress to the legislative authority of the State of Georgia in the following form :

"By the United States in Congress assembled in the City of New York on the 1st day of June in the year of our Lord, 1785, and of the independence of the United States of America the 9th : To the legislative authority of the State of Georgia : it is hereby made known that, in pursuance of the 9th of the articles of confederation and perpetual union, the legislature of the State of South Carolina have presented a petition to Congress in the words following:

"To the United States of America in Congress assembled : The petition of the legislature of South Carolina showeth, That a dispute and difference hath arisen and subsists between the State of Georgia and this State concerning boundaries, the said States claiming respectively the same territories. That the case and claim of this State are as follows, viz.: Charles 2d, King of Great Britain, by charter, dated the 24th day of March, in the 15th year of his reign, granted to eight persons therein named, as lords proprietors thereof, all the lands lying and being within his dominions of America between 31 and 36 degrees of north latitude in a direct west line to the South Seas, styling the lands so described the province of Carolina. That on the 30th day of June, in the 17th year of his reign, the said king granted to the said lords proprietors a second charter, enlarging the bounds of Carolina, viz.: from 29 degrees of north latitude to 36 degrees 30 minutes, and from those points on the sea coast west in a direct line to the South Seas. That seven of the said proprietors of Carolina sold and surrendered to George II., late King of Great Britain, all their title and interest in the said province, and the share of the remaining proprietor was separated from the King's, and allotted to him in the north part of North Carolina. That Carolina was afterwards divided into two provinces called North and South Carolina. That, by a charter, dated the 9th day of June, 1732, George II., King of Great Britain, granted to certain persons therein named all the lands lying between the rivers Savannah and Alatamaha, and between lines to be drawn from the heads of those rivers respectively to the South Sea, and styled the said colony Georgia. That by the treaty of peace concluded at Paris on the 10th day of February, 1763, the river Mississippi was declared to be the western boundary of the North American colonies. That the governor of South Carolina in the year 1762, conceiving that the land to the southward of the Alatamaha still belonged to South Carolina, granted several tracts of the said land. That the government of Georgia complained to the king of Great Britain respecting those grants, as being for land within its limits, and thereupon his majesty, by proclamation, dated the 7th day of October, 1763, annexed to Georgia all the lands lying between the rivers Alatamaha and St. Mary's, the validity of the grants passed by the governor of South Carolina, as aforesaid, remaining however acknowledged and uncontested and the grantees of the said land or their representatives still holding it as their legal estate. That South Carolina claims the lands lying between the North Carolina line and a line to be run due west from the mouth of Tugoloo river to the Mississippi, because, as the said State

contends, the river Savannah loses that name at the confluence of Tugoloo and Keowee rivers, consequently that spot is the head of Savannah river; the State of Georgia on the other hand contends that the source of Keowee river is to be considered as the head of Savannah river. That the State of South Carolina also claims all the lands lying between a line to be drawn from the head of the river St. Mary, the head of Alatamaha, the Mississippi, and Florida, being, as the said State contends, within the limits of its charter, and not annexed to Georgia by the said proclamation of 1763; the State of Georgia on the other hand contends that the tract of country last mentioned is a part of that State; therefore, and inasmuch as the United States in Congress assembled are the last resort on appeal in all disputes and differences between two or more States concerning boundary, the legislature of South Carolina pray for a hearing and determination of the differences and dispute subsisting as aforesaid between Georgia and this State, agreeable to the articles of confederation and perpetual union between the United States of America. In the Senate house, this 24th day of March in the year of our Lord, 1785, and in the 9th year of the independence of the United States of America.'

And that the 2d Monday of May next is assigned for the appearance of the said States of South Carolina and Georgia by their lawful agents to proceed in the premises, as by the said articles of confederation and perpetual union is directed.

By order of Congress.

CHARLES THOMSON,

Secretary.

JULY 1st, 1785.—*Resolved*, that the salaries of the Judges of the Court of Appeals shall henceforth cease.

TUESDAY, February 9th, 1786.—On the report of a committee consisting of Mr. Pinckney, Mr. King, Mr. Johnson, Mr. Grayson and Mr. Hindman, to whom was referred a letter from Cyrus Griffin, Esq.

Resolved, That Congress are fully impressed with a sense of the ability, fidelity and attention of the judges of the court of appeals in the discharge of the duties of their office; but that, as the war was at an end, and the business of that court in a great measure done away, an attention to the interests of their constituents made it necessary that the salaries of the said judges should cease.

MONDAY, April 17th, 1786.—The delegates for the commonwealth of Massachusetts laid before Congress the following act of the legislature of that State, empowering them, in conjunction with the agents of New York, to nominate judges for a federal court to settle a controversy between those States relative to the western lands. "Commonwealth of Massachusetts, in Senate, December 1, 1785,—whereas, it is necessary that some persons be specially authorized to represent this State in the appointment of a federal court to hear and determine a certain controversy now subsisting between this commonwealth and the State of New York respecting a certain territory to which that government and this make claim. *Resolved*, That the delegates who shall actually

represent this commonwealth in Congress the current year or any two of them be and they hereby are authorized and empowered to join with such agent or agents as may be appointed by the State of New York, to appoint commissioners or judges, who shall constitute a federal court for the purposes aforesaid, as particularly mentioned in a resolve passed the 14th day of November, A.D. 1784. Sent down for concurrence. Samuel Philips, Jun., President. In the House of Representatives, March 17, 1786. Read and concurred, A. Ward, Speaker. Approved, James Bowdoin.

True copy. JOHN AVERY, jun., *Secretary.*"

MONDAY, May 15th, 1786.—A letter of this day from the honorable James Monroe was read informing "that some circumstances will put it out of his power to act as a judge for the decision of the controversy between the States of Massachusetts and New York, and therefore he presents his resignation to Congress."

WEDNESDAY, September 13th, 1786.—A motion was then made by the delegates of Georgia that Congress proceed to strike a Court in the manner pointed out by the confederation for the trial of certain territorial claims between the States of South Carolina and Georgia, to be held at the City of New York on the first Monday in May next. The latter part of the question being postponed—on the question—

Resolved, That Congress proceed to strike a court in the manner pointed out by the confederation for the trial of certain territorial claims between the States of South Carolina and Georgia.

Accordingly, Congress proceeded and named three persons out of each of the United States, and from the list of such persons each party alternately struck out one, the petitioners beginning, until the number was reduced to thirteen. This done, on motion of the delegates of South Carolina,

Resolved, That, from the thirteen names left, nine names be drawn out by lot.

The names being then put into a box, the following were in the presence of Congress drawn out by lot, namely: Alexander Coutee Hanson, James Madison, Robert Goldsborough, James Duane, Philemon Dickinson, John Dickinson, Thomas McKean, Egbert Benson, and William Pynchon.

THURSDAY, September 14, 1786.—*Resolved*, That the Court appointed to hear and determine the matter in question between the States of South Carolina and Georgia be summoned to meet at the city of New York on the third Monday in June next.

FEBRUARY 3d, 1787.—In pursuance of the appointment made on the 10th of September, 1786, of persons to constitute a court to hear and determine the matter in controversy between the States of South Carolina and Georgia, the following gentlemen have signified their acceptance of the office, and that they will attend at New York at the time appointed.

MONDAY, October 8th, 1787.—A motion being made by Mr. Dane, seconded by Mr. Smith, as follows:

'*Whereas*, it appears by the journals of Congress, that a federal court has been instituted, pursuant to the articles of confederation and perpetual union, to hear and determine a controversy respecting territory between the States of Massachusetts and New York.

And *whereas*, it appears by the representations of the delegates of the said States in Congress that the said controversy has ceased, and that the same has been settled and determined by an agreement entered into on the 16th day of December last, by the agents of the said States, in the words following, to wit: Any further proceedings, therefore, in or relative to the aforesaid court having become unnecessary, *Resolved*, That all further proceedings in and relative to the said federal court, as also the commissions of the judges thereof, cease and determine.'

A motion was made by Mr. Madison, seconded by Mr. Clarke, to strike out the words 'in the words following, to wit;' and on the question, shall those words stand? the yeas and nays being required by Mr. Smith.

So the question was lost, and the words were struck out; and, on the question, the motion, being amended, was agreed to as follows:

Whereas, it appears by the journals of Congress that a federal court has been instituted, pursuant to the articles of confederation and perpetual union, to hear and determine a controversy respecting territory between the States of Massachusetts and New York: and whereas it appears by the representations of the delegates of the said States in Congress, that the said controversy has ceased, and the same has been settled and determined by an agreement entered into on the 16th day of December last, by the agents of the said States, and any further proceedings in or relative to the aforesaid court having become unnecessary.

Resolved, That all further proceedings in and relative to the said federal court, as also the commissions of the judges thereof cease and determine.

A motion was then made by Mr. Dane, seconded by Mr. Yates, that the attested copy of the aforesaid agreement, laid before Congress by the delegates of the two States, be filed in the secretary's office; the same being in the words following:

'To all to whom these presents shall come, The underwritten, John Lowell, James Sullivan, Theopilus Parsons, and Rufus King, agents or commissioners, appointed by the commonwealth of Massachusetts of the one part, and the underwritten, James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith, and Egbert Benson, six of the agents or commissioners, appointed by the State of New York of the other part, send greeting: Whereas, the commonwealth of Massachusetts did, heretofore, present a petition to the United States in Congress assembled, thereby, among other things, stating, that all that territory which, in the said petition, is described as 'All that part of New England, in America, which lieth and extendeth between a great river, called Merrimack, and a certain other river there, called Charles river, being the bottom of a bay there, called Massachusetts-Bay: and also, all those lands lying within three English miles to the southward of the southermost part of the said bay; and extending thence northward, in latitude to the northward of every part of said river Merrimack; and in breadth of latitude aforesaid, ex-

tending throughout all the main land, in longitude, westwardly, to the southern ocean,' was the just and proper right of the said commonwealth; and farther, stating, that the State of New York had set up a claim to some part of the land before mentioned, the said commonwealth did, therefore, by the said petition, solemnly request of the United States in Congress, that commissioners might be appointed, for enquiring into and determining upon the claim aforesaid, of the legislature of the said commonwealth, and that such other proceedings, respecting the premises, might be had, as are, by the federal government of the said United States, in such case made and provided, as by the said petition filed among the archives of the United States, reference being thereunto had, may more fully appear.

And whereas, the State of New York, doth, in opposition to the said claim of the commonwealth of Massachusetts, claim, as the just and proper right of the said State, as well as in respect of property as jurisdiction, all those lands and territories bounded on the north by the parallel of the latitude passing through the said point, place or boundary aforesaid, of three miles to the northward of every part of the said river Merrimack, and bounded on the south by the parallel of latitude passing through the said point or place, situate three miles south of the southernmost part of the said bay, called Massachusetts Bay, bounded on the west by the limits between the United States and the king of Great Britain, and the line of cession from the State of New York to the United States, and bounded on the east by the line agreed on and established between the late colony of the Massachusetts Bay and the late colony of New York, in the year 1773, and from the northern termination of the said line, then bounded on the east by the west bank of Connecticut river.

And whereas, the State of New York, having been duly notified, did appear, by their lawful agents, to vindicate such their said right against the said claim of the said commonwealth, and proceedings were thereupon had in Congress, pursuant to the articles of confederation, in order to the appointment of commissioners or judges to constitute a court for hearing and determining the said matters in question.

And whereas, the said John Lowell, James Sullivan, Theopilus Parsons and Rufus King, were afterwards, by a certain commission, under the seal of the said commonwealth, and bearing date the 26th day of April, in the 9th year of the independence of the United States, and made in pursuance of an act of the legislature of the said commonwealth, passed the 14th day of March, in the 8th year of the independence of the United States; and of a resolution of the said legislature, passed the 18th day of the said month of March, commissionated to be agents, to manage, conduct and prosecute the claims of the said commonwealth, to the lands described in the said petition.

And whereas, afterwards, and pending such proceedings in Congress, the legislature of the commonwealth of Massachusetts did, by an act, entitled an act empowering the agent appointed by this government, to defend the territory on the west side of 'Hudson's river, against the claims of the State of New York, to settle the controversy relative thereto, otherwise than by a federal court, if they shall judge it expedient,' enact, that the major part of the said agents or commissioners, should be fully authorized and empowered to agree with the agents or commissioners, of the State of New York, and settle

the controversy respecting the territory aforesaid, by a federal court, as appointed by virtue of the confederation, or otherwise, in such way and manner as they should judge would comport with justice and the interest of the said commonwealth; and the legislature of the State of New York did, by an act, entitled 'An act supplementary to the act, entitled an act to appoint agents or commissioners, for vindicating the right and jurisdiction of this State, against the claims of the commonwealth of Massachusetts, pursuant to the articles of confederation and perpetual union of the United States,' among other things enact, that it should be lawful for the said James Duane, Robert R. Livingston, Egbert Benson, John Haring, Melancton Smith and Robert Yates, and also John Lansing, jun., or any five or more of them, to settle the said controversy between the said State of New York, and the said commonwealth of Massachusetts, otherwise than by the said federal court, in such manner as they should judge most conducive to the interest of the said State, as by the said commission and the said several acts, relation being thereunto had, may appear:

Now, therefore, know ye, that the underwritten commissioners, on the part of the commonwealth of Massachusetts and the State of New York, respectively, having, by mutual consent, assembled at the city of Hartford, in the State of Connecticut, on the 30th day of November last, in order to the due execution of their respective trusts, and having duly exchanged and considered their respective powers, and declared the same legal and sufficient, after several conferences, and to the end that all interfering claims and controversies between the said commonwealth of Massachusetts and the said State of New York, as well in respect of jurisdiction as property, may be finally settled and extinguished, and peace and harmony forever established between them on the most solid foundation; have agreed, and by these presents do mutually for and in behalf of the said commonwealth of Massachusetts and the said State of New York, by whom, respectively, they, the said commissioners, have been so appointed and authorized as aforesaid, agree to the mutual cessions, grants, releases, and other provisions following, that is to say: First, the commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York forever, all the claim, right and title which the commonwealth of Massachusetts hath to the government, sovereignty and jurisdiction of the lands and territories so claimed by the State of New York, as hereinbefore stated and particularly specified,

Secondly, the State of New York doth hereby cede, grant, release, and confirm to the said commonwealth of Massachusetts, and to the use of the commonwealth, their grantees, and the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title, and property (the right and title of government, sovereignty, and jurisdiction excepted) which the State of New York hath, of, in, or to 230,400 acres to be located by the commonwealth of Massachusetts, and to be situate to the northward of and adjoining to the lands granted respectively to Daniel Coxe and Robert Lettice Hooper, and their respective associates, and between the rivers Oswego and Chenengo, and also of, in, or to all the lands and territories within the following limits and bounds, that is to say, beginning in the north boundary line of the State of Pennsylvania, in the parallel of

42 degrees of north latitude, at a point, distant 82 miles west from the north-east corner of the State of Pennsylvania, on Delaware river, as the said boundary line hath been run and marked by the commissioners appointed by the States of Pennsylvania and New York, respectively; and from the said point or place of beginning, running on a due meridian north, to the boundary line between the United States of America and the king of Great Britain; thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination of the streight or waters between lake Ontario and lake Erie, thence south along the said meridian to the south shore of lake Ontario; thence on the eastern side of the said streight, by a line always one mile distant from and parallel to the said streight, to lake Erie; thence due west to the boundary line between the United States and the king of Great Britain; thence along the said boundary line until it meets with a line of cession from the State of New York, to the United States; thence along the said line of cession, to the northwest corner of the State Pennsylvania, and thence east along the northern boundary line of the State of Pennsylvania, to the said place of beginning; and which said lands and territories so ceded, granted, released and confirmed, are parcel of the lands and territories described in the said petition.

Thirdly, the commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of New York, and their grantees, and the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right title and property which the commonwealth of Massachusetts hath of, in, or to the residue of the lands and territories so claimed by the State of New York, as hereinbefore stated and particularly specified.

Fourthly, that the lands so ceded, granted, released and confirmed to the commonwealth of Massachusetts, or such part thereof as shall, from time to time, be and remain the property of the commonwealth of Massachusetts, shall, during the time that the same shall so be and remain such property, be free and exempt from all taxes whatsoever, and that no general or State tax shall be charged on or collected from the lands hereafter to be granted by the commonwealth of Massachusetts, or on the occupants or proprietors of such lands, until 15 years after such confirmation as is hereinafter mentioned of such grants shall have expired; but that the lands so to be granted, and the occupants thereof, shall during the said period, be subject to town or county charges or taxes only; provided that this exemption from General or State taxes shall not be construed to extend to such duties, excises or imposts to which the other inhabitants of the State of New York shall be subject and liable.

Fifthly, that no rents or services shall be reserved in any grants to be made of the said lands, by the commonwealth of Massachusetts.

Sixthly, that the inhabitants on the said lands and territories, being citizens of any of the United States, and holding by grants, from the commonwealth of Massachusetts, shall be entitled to equal rights with the other citizens of the State of New York; and further, that the citizens of the commonwealth of Massachusetts, shall, from time to time, and at all times hereafter, have and enjoy the same and equal rights respecting the navigation and fishery on and

in Lake Ontario and Lake Erie, and the waters communicating from the one to the other of the said lakes, and respecting the roads and portages between the said lakes, as shall, from time to time, be had and enjoyed by the citizens of the State of New York; and the citizens of the commonwealth of Massachusetts shall not be subject to any other regulations or greater tolls or duties to be made or imposed, from time to time, by the State of New York, respecting the premises, than the citizens of the State of New York shall be subject to.

Seventhly, that no adverse possession of the said lands for any length of time shall be adjudged a disseizen of the commonwealth of Massachusetts.

Eighthly, that the State of New York, so long as any part of the said lands shall be and remain the property of the commonwealth of Massachusetts, shall not cede, relinquish, or in any manner divest themselves of the government and jurisdiction of the said lands, or any part thereof, without the consent of the commonwealth of Massachusetts.

Ninthly, that the commonwealth of Massachusetts may, from time to time, by persons to be by them authorized for the purpose, hold treaties and conferences with the native Indians, relative to the property or right of soil of the said lands and territories hereby ceded, granted, released and confirmed to the commonwealth of Massachusetts, and with such armed force as they shall deem necessary for the more effectual holding such treaty or conference ; and the commonwealth of Massachusetts, within six months after such treaties shall respectively be made, shall cause copies thereof to be deposited in the office of the secretary of the State of New York.

Tenthly, the commonwealth of Massachusetts may grant the right of preemption of the whole or any part of the said lands and territories, to any person or persons, who, by virtue of such grant, shall have good right to extinguish by purchase the claims of the native Indians, provided, however, that no purchase from the native Indians by any such grantee or grantees shall be valid, unless the same shall be made in the presence of and approved by a superintendent to be appointed for such purpose by the commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the commonwealth of Massachusetts.

Eleventhly, that the grantees of the said lands and territories under the commonwealth of Massachusetts, shall, within six months after the confirmation of their respective grants, cause such grants, or the confirmations thereof, or copies of such grants or confirmations, certified or exemplified under the seal of the commonwealth of Massachusetts, to be deposited in the said office of Secretary of the State of New York, to the end that the same may be recorded there; and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said secretary their respective grants or confirmations, or the copies thereof, whichsoever may have been so deposited, without any charges or fees of office whatsoever, and every grant or confirmation which shall not, or of which such copy shall not be so deposited, shall be adjudged void.

In testimony whereof, the said John Lowell, James Sullivan, Theophilus Parsons and Rufus King, for and in the name and behalf of the said commonwealth of Massachusetts, and the said James Duane, Robert R. Livingston,

Robert Yates, John Haring, Melancton Smith and Egbert Benson, for and in the name and on behalf of the said State of New York, have to these presents, and a duplicate thereof, both indented, interchangeably set their hands and affixed their seals.

Done at the city of Hartford aforesaid, the 16th day of December, in the year of our Lord 1786, and the 11th year of the independence of the United States of America.

John Lowell (L. S.), James Sullivan (L. S.), Theophilus Parsons (L. S.), Rufus King (L. S.), James Duane (L. S.), Robert R. Livingston (L. S.), Robert Yates (L. S.), John Haring (L. S.), Melancton Smith (L. S.), Egbert Benson (L. S.).

Witnesses present at the sealing and delivery: George Wyllys, Thos. Seymour, Jesse Root, Jere. Wadsworth, D Humphreys, Wm. Imlay, Joseph Webb, Simeon De Witt, Lewis Duboys, Nathaniel Bethune.

Be it remembered, that on this 30th day of January, in the year of our Lord 1787, personally appeared before me Richard Morris, Esq., Chief Justice of the State of New York, Jeremiah Wadsworth and Lewis Duboys, Esqs., two of the subscribing witnesses to the within instrument, who being by me duly sworn, did severally depose and say, that they were present, and did see the within-named James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith, Egbert Benson, John Lowell, James Sullivan, Theophilus Parsons and Rufus King, severally, sign, seal and deliver the within instrument as their, and each of their, free and voluntary act and deed, to and for the uses and purposes therein mentioned; and that George Wyllys, Thomas Seymour, Jesse Root, D. Humphreys, William Imlay, Simeon De Witt and Nathaniel Bethune, the other subscribing witnesses, were also present, and did, together with the deponents, sign and subscribe their names as witnesses to the execution thereof; and I having inspected the said instrument, and finding no interlineations or material erasures therein, except those noted in the body thereof to have been made before the execution thereof, do allow the same to be recorded.

RICHARD MORRIS.

Secretary's Office, Office of the State of New York, ss.:

I certify that the within instrument and certificate are recorded in the said office, in book of miscellaneous records, endorsed: "A. M. R., page 38," &c. Examined and compared with the said record copy thereof, this 2d day of February, 1787, by me, Robert Harpur, deputy-secretary.

Secretary's Office of the State of New York, ss.:

I do hereby certify the aforegoing to be a true copy of the original thereof remaining in the said office (the word "hath" between the 27th and 28th lines, and the syllable "in" between the 45th and 46th lines, being first interlined; and the words "excises" on the 39th and "Richard Morris" on the 62d lines, being first written on erasures).

Examined and compared therewith this 8th day of August, 1787, by me, Robert Harpur, deputy-secretary."

On the question to agree to this motion, the yeas and nays being required by Mr. Smith.

So the question was lost.

Extracts from Public Journals.

The Independent Gazetteer—Friday, October 5th, 1787:

The judicial power to be vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish. The objects of jurisdiction recited above, are so numerous and the shades and distinctions between civil causes are oftentimes so slight that it is more than likely that the State judicatories would be wholly superceded, for in contests about jurisdiction the Federal Court, as the most powerful, would ever prevail. Every person acquainted with the history of the Courts in England, knows by what ingenious sophisms they have at different periods extended the sphere of their jurisdiction over subjects out of the line of their institution and contrary to their very nature, courts of a criminal jurisdiction obtaining cognizance in civil causes.

If the foregoing be a just comment, if the United States are to be melted down into one empire, it becomes you to consider whether such a government however constructed, would be eligible in so extended a territory and whether it would be practicable, consistent with wisdom. * * * * * From this investigation and from the organization of this government, it appears that it is devoid of all responsibility to the great body of the people and that so far from being a regular balance government it would be in practice a permanent aristocracy. * * * * * And it is worthy of remark that there is no declaration of personal rights premised in most free constitutions, and that trial by jury in civil cases is taken away, for what other construction can be put on the following, viz.: Article 3, Section 2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction. In all other cases above mentioned the Supreme Court shall have *appellate* jurisdiction both as to law and fact. It would be a novelty in jurisprudence as well as evidently improper to allow an appeal from the verdict of the jury on the matter of fact, therefore it implies and allows a dismission of the jury in civil cases, and especially when it is considered that jury trial in criminal cases is especially stipulated for, but not in civil cases.

Independent Gazetteer—Friday, October 19th, 1787.

* * * * * I will conclude my observations on this section in the new Constitution. In all cases affecting ambassadors, other public ministers, and those in which a State shall be a party, the Supreme Court shall have *original jurisdiction*, and in all the other cases above mentioned, that is particular civil cases in which jurisdiction is given to the Federal Court, the Supreme Court shall have *appellate* jurisdiction both as to law and fact, with such exception and under such regulations as the Congress shall make. There can be no doubt but the immediate representatives of the people in Congress, will under this clause take care that the trial of facts by jury will be one of the regulations in those cases where this mode of trial is suited to the subject of the cause. If they do not the people can well send other members who are more faithful in their trust.

Independent Gazetteer—Saturday, November 10th, 1787.

Trial by jury has been seen to be expressly preserved in criminal cases. In civil cases the Federal Court is like a Court of Chancery, *except that it has original jurisdiction only in State affairs.* In all other matters it has appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. * * * * *

Pennsylvania Packet—January 9th, 1788. Letter from Edmund Randolph:

But I am sanguine in hoping that in every other justly obnoxious clause Virginia will be seconded by a majority of the States. I hope she will be seconded in limiting and defining the judicial power.

Pennsylvania Packet—January 16th, 1788. Letter from Richmond, Va.:

The judicial powers of the Federal Courts have also been greatly misrepresented. It is said that * * * * *the Courts of the several States are to be annihilated.* But these, sir, are mistaken notions and scandalous perversions of truth. The Courts of judicature in each State will continue in their present situation. It is only in particular specified cases, of which each State cannot properly take cognizance, that the judicial authority of the Federal Courts can be exercised.

Pennsylvania Packet—January 22d, 1788. From the *Maryland Gazette.* Mr. Martin's information to the House of Assembly:

* * * * Among other powers given to this Government in the Eighth Section it has that of appointing tribunals inferior to the Supreme Court; to this power there was opposition. It was urged that there was no occasion for inferior courts of the General Government to be appointed in the different States and that such ought not to be admitted—that the different State judiciaries in the respective States would be competent to and sufficient for *the cognizance in the first instance* of all cases that should arise under the laws of the General Government, which being by this system made the supreme law of the States would be binding on the different State judiciaries—that by giving an appeal to the Supreme Court of the United States the General Government would have a sufficient check over their decisions and security for enforcing of their laws—that to have inferior courts appointed under the authority of Congress in the different States would eventually absorb and swallow up the State judiciaries by drawing all business from these to the courts of the General Government which the extensive and undefined powers, legislative and judicial, of which it is possessed would easily enable it to do—that it would unduly and injuriously increase the weight and influence of Congress in the several States, be productive of a prodigious number of officers, and be attended with enormous additional and unnecessary expense—that the judiciaries of the respective States not having power to decide upon the laws of the General Government but the determination on those laws being confined to the judiciaries appointed under the authority of Congress *in the first instance as well as on appeal*, there would be a necessity for judges or magistrates of the General Government, and those to a considerable number in each county of

every State—that there would be a necessity for courts to be holden by them in each county, and that these courts would stand in need of all their proper officers, such as sheriffs, clerks and others commissioned under the authority of the General Government; in fine, that the administration of justice as it will relate to the laws of the General Government would require in each State all the magistrates, courts, officers and expense which is now found necessary in the respective States for the administration of justices as it relates to the laws of the State Governments. But here again we were overruled by a majority who, assuming it as a principle that the General Government and the State Governments (as long as they should exist) would be at perpetual variance and enmity and that their interests would constantly be opposed to each other, insisted for that reason that the State judges, being citizens of their respective States, ought not, though acting on oath, to be entrusted in the administration of the laws of the General Government.

Pennsylvania Packet—February 8, 1788. "From the *Maryland Gazette*. Mr. Martin's Information to the House of Assembly continued:

By the third article the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. These courts, and these only, will have a right to decide upon the laws of the United States and all questions arising upon their construction and in a judicial manner to carry those laws into execution; to which the courts, both superior and inferior, of the respective States, and their judges and other magistrates, are rendered incompetent—to the courts of the General Government are also confined all cases in law or equity arising under the authority of the United States—all cases affecting ambassadors, other public ministers and consuls; all cases of admiralty and maritime jurisdiction; all controversies to which the United States are a party; all controversies between two or more States; between a State and citizens of another State; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens or subjects; whether, therefore, any laws or regulations of the Congress or any acts of its President or other officers are contrary to or not warranted by the Constitution rests only with the judges who are appointed by Congress to determine—by whose determinations every State must be bound—*should any question arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the General Government, and in the first instance to be heard in the Supreme Court*, however inconvenient to the parties and however trifling the subject of dispute.

Should the mariners of an American or foreign vessel while in any American port have occasion to sue for their wages, or in any other instance a controversy belonging to the admiralty jurisdiction should take place between them and their masters or owners, it is in the courts of the General Government the suit must be instituted, and either party may carry it by appeal to the Supreme Court. The injury to commerce and the oppression to individuals which may thence arise need not be enlarged upon. Should a citizen of Virginia, Pennsylvania or any other of the United States be indebted to or have debts due from

a citizen of this State, or any other claim be subsisting on the one side or the other, in consequence of commercial or other transactions, it is only in the Courts of Congress that either can apply for redress. The case is the same should any claims subsist between citizens of this State and foreigners, merchants, mariners and others, whether of a commercial or of any other nature, they must be prosecuted in the same courts; *and though in the first instance they may be brought in the inferior*, yet an appeal may be made to the Supreme judiciary even from the remotest State in the Union.

The inquiry concerning a trial of every offence against it—a breach of the Laws of Congress is also confined to its Courts. The same Courts also have the sole right to inquiry concerning and trying every offence from the lowest to the highest, committed by the citizens of any other States or of a foreign nation against the laws of this State within its territory. And in all these cases the decision may be ultimately brought before the supreme tribunal since the appellate jurisdiction extends to criminal as well as to civil cases."

Pennsylvania Packet– February 21st, 1788 :

Speech of Mr. C. Pinckney in the House of Representatives of South Carolina, January 16, 1788, on which day the House went into a committee of the whole to take into consideration a message from the Governor, accompanied by a copy of the New Federal Constitution :

Mr. Pinckney rose in his place and said :

* * * * The judicial, he conceived to be at once the most important and intricate part of the system. That a supreme federal jurisdiction was indispensable cannot be denied. It is equally true that in order to ensure the administration of justice it was necessary to give all the powers *original* as well as *appellate*, the Constitution has enumerated. Without it we could not expect a due observance of treaties—that the State judiciaries would confine themselves within their proper sphere, or that general sense of justice pervading the Union which this part of the Constitution is intended to introduce and protect—that much, however, would here depend upon the wisdom of the Legislature who are to organize it—that from the extensiveness of its powers it may be easily seen that under a wise management this department might be made the keystone of the arch—the means of connecting and binding the whole together—of preserving uniformity in all the judicial proceedings of the Union—that republics much more in time of peace would always depend upon the energy and integrity of the judicial than on any other part of the Government—that to ensure these, extensive authorities were necessary—particularly so were they *in a tribunal constituted as this is whose duty it would be* not only to decide all national questions which should arise within the union, but *to control and keep the State* judicials within their proper limits whenever they shall attempt to interfere with its power."

Pennsylvania Packet—February 22d, 1788 :

NEW YORK, February 16, 1788 :—We are happy in having it in our power to communicate to our readers the authentic and agreeable intelligence of the adoption of the New Constitution by the State of Massachusetts. * * * *

FORM OF RATIFICATION.

Commonwealth of Massachusetts. In Convention of Delegates of the People of the Commonwealth of Massachusetts, February 6th, 1788.

The Convention, having impartially discussed and fully considered the Constitution of the United States of America, reported to Congress by the Convention of Delegates from the United States of America, and submitted to us by a resolution of the General Court of the same commonwealth, passed the 25th day of October last past, and acknowledging with grateful hearts the goodness of the Supreme Ruler of the Universe, in affording the people of the United States, and in the course of his Providence, an opportunity deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union, which would best ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, DO, in the name and in behalf of the people of the commonwealth of Massachusetts, ASSENT TO and RATIFY the said Constitution of the United States of America.

And, as it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove fears and quiet the apprehensions of certain of the good people of this commonwealth, and more effectually guard against an undue administration of the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution.

1st. That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised. * * * *

7th. The supreme judicial federal Court shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute, whether it concerns realty or personalty be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any actions between citizens of different States, where the matter in dispute, whether it concerns realty or personalty is not of the value of fifteen hundred dollars at the least.

8th. In civil actions between citizens of different States, every issue of fact arising in actions at common law shall be tried by a jury, if the parties or either of them request it. * * *

And the Convention do, in the name and in behalf of the people of this commonwealth, enjoin it upon their representatives in Congress at all times, until the alterations and provisions aforesaid have been considered agreeably to the fifth Article of the said Constitution, to exert all their influence, and use all reasonable and legal methods to obtain a ratification of the said alterations and provisions in such manner as provided in the said article.

Pennsylvania Packet—March 5, 1788:

New York, February 25, 1788.—The following remarks on the new plan of government are handed us as the substance of Dr. Williamson's address to the Freemen of Edenton and the County of Chowan in North Carolina, when assembled to instruct their representatives:

* * * * "It is complained that the powers of the national judiciary are too extensive. This objection appears to have the greatest weight in the eyes gentlemen *who have not carefully compared the powers which are to be delegated, with those that have formerly delegated to Congress.* The powers that are now to be committed to the national legislature, as they are detailed in the eighth section of the fifth article, have already been chiefly delegated to the Congress under one form or the other, except those which are contained in the first paragraph of that section; and the subjects which are now to be committed to the supreme judiciary, or to the inferior courts, are those which naturally arise from the constitutional laws of Congress. If there is a single new case that can be exceptionable, it is that between a foreigner and a citizen, or that between citizens of different States. These cases may come up by appeal. It is provided in this system that there shall be no fraudulent tender in the payment of debts. Foreigners with whom we have treaties will trust our citizens on the faith of this engagement, and the citizens of different States will do the same. If the Congress had a negative or the laws of the several States, they would certainly prevent all such laws as might injure the honor or peace of the nation by making a tender of peace money. But they have no such power, and it is at least possible that some State may be found in this Union disposed to break the Constitution, and abolish private debts by such tenders. In these the courts of the offending States would probably decide according to its own laws. The foreigner would complain, and the nation might be involved in war for the support of such dishonest measures. Is it not better to have a court of appeals, in which the judges can only be determined by the laws of the nation? This court is equally to be desired by the citizens of different States. But we are told that justice will be delayed, and the poor will be driven away by the rich to a distant court. The authors of this remark have not fully considered the question, else they must have recollected that the poor of this country have little to do with foreigners, or with the citizens of distant States. These do not consider that there may be an inferior court in every State, nor have they recollected that the appeals being with such exceptions and under such regulations as Congress shall make, will never be permitted for trifling sums or under trivial pretences, unless we can suppose that the national legislature shall be composed of knaves and fools. The line that separates the powers of the national legislature from those of the several States is clearly drawn. The several States reserved every power that can be exercised for the particular use and comfort of the State. They do not yield a single power which is not absolutely necessary to the safety and prosperity of the nation, nor one that could be employed to any effect in the hands of particular States. The powers of judiciary naturally rise with those of the legislature. Questions that are of a national concern, and those cases which are determinable by the general laws of the nation, are to be referred to the national judiciary, *but they have not anything to do with a single case, either civil or criminal, which respects the private and particular concerns of a State or its citizens.*

Pennsylvania Packet—May 5, 1788:

"From a letter to the *Maryland Journal*, dated Baltimore, April 29, 1788.

PROPOSED AMENDMENTS.

* * * * That the Supreme Federal Court shall not admit of fictions to extend its jurisdiction, *nor shall citizens of the same State having controversies with each other be suffered to make collusive assignments of their rights to citizens of another State, for the purpose of defeating the jurisdiction of the State courts;* nor shall any matter or question already determined in the State courts be received or agitated in the Federal courts; that *there be no appeal* from law or fact *to the Supreme Court where the claim or demand does not exceed three hundred pounds sterling.*"

Pennsylvania Packet—May 8, 1788:

"*From the Maryland Gazette.*

To the People of Maryland: The following facts disclosing the conduct of the late Convention of Maryland are submitted to the serious consideration of the citizens of the State. * * * * The following amendments to the proposed Constitution were separately agreed to by the committee, most of them by a unanimous vote, and all of them by a great majority. * * * *

5. That in all cases of trespasses done within the body of a county, and within the inferior federal jurisdiction, the party injured shall be entitled to trial by jury in the State where the injury shall be committed; *and that it be expressly declared that the State courts in such cases shall have concurrent jurisdiction with the federal courts;* and there shall be no appeal from either, except on matter of law; *and that no person be exempt from such jurisdiction and trial but ambassadors and ministers privileged by the law of nations.*

6. That the federal courts shall not be entitled to jurisdiction by fictions or collusion.

7. That the federal judges do not hold any other office of profit, or receive the profits of any other office under Congress, during the time they hold their commissions."

Pennsylvania Packet—July 8, 1788:

"Amendments to the Constitution proposed by the New Hampshire Convention: * * * *

7th. *All common law causes between citizens of different States shall be commenced in the common law courts of the respective States*, and *no appeal shall be allowed* to the federal courts in such cases, *unless* the *sum* or value of the thing *in controversy amount to three thousand dollars.*"

Pennsylvania Packet—July 11, 1788:

"Richmond (Virginia), July 3. In Convention—Friday, the 27th of June, 1788.

Mr. Wythe reported from the committee appointed such amendments to the proposed Constitution of government for the United States as were by them

deemed necessary to be recommended to the consideration of Congress, &c. * * * *

14. That the judicial power of the U. States shall be vested in one Supreme Court, and such courts of admiralty as Congress may from time to time ordain and establish in any of the different States: the judicial power shall extend to all cases of law and equity arising under treaties, made or which shall be made under the authority of the United States; to all cases affecting ambassadors, other foreign ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, and between parties claiming lands under the grants of different States. In all cases affecting ambassadors, other foreign ministers and consuls, *and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; in all other cases before mentioned the Supreme Court shall have appellate jurisdiction* as to matters of law only, except in cases of equity, and of admiralty and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall make; but the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in disputes between States about their territory, disputes between persons claiming lands under the grants of different States, and suits for debts due to the United States."

Pennsylvania Packet—August 4, 1788.

Ratification of the Constitution of the Convention of the State of New York: * * * * And the Convention do, in the name and behalf of the people of the State of New York, enjoin it upon their representatives in Congress to exert all their influence, and use all reasonable means to obtain a ratification of the several amendments to the said Constitution in the manner prescribed therein. * * * *

That no person shall be eligible to the office of President of the United States a third time. * * * *

That Congress shall not constitute, ordain or establish any tribunals or inferior courts with any other than appellate jurisdiction, except such as may be necessary for the trial of causes of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas; and in all other cases, to which the judicial power of the United States extends, and in which *the Supreme Court of the United States has not original jurisdiction*, the causes shall be *heard, tried* and *determined in some one of the State courts*, with the right of appeal to the Supreme Court of the United States, or other proper tribunal to be established for that purpose by the Congress, with such exceptions and under such regulations as the Congress shall make. * * * *

That persons aggrieved by any judgment, sentence or decree *of the Supreme Court of the United States* in any case in which that court has *original jurisdiction*, with such exceptions and under such regulations as the Congress shall make concerning the same, shall, upon application, have a commission, to be issued by the President of the United States, to such men learned in the land as he shall nominate, and by, and with the advice and consent of the

Senate, appoint not less then seven, authorizing such commissioners, or any seven or more of them, to correct errors in such judgment, or to review such sentence and decree as the case may be, and to do justice to the parties in the premises.

That no judge of the Supreme Court of the United States shall hold any any other office under the United States, or any of them.

That the judicial power of the United States shall extend to no controversies, respecting lands, unless it relate to claims of land between individuals, or between States and individuals, under the grants of different States."

Pennsylvania Packet, August 30, 1788 :

State of North Carolina, in Convention August 2, 1788.

* * * * *Resolved*, That the following amendments to the most ambiguous and exceptionable parts of the Constitution of government ought to be laid before Congress on the Convention of States * * * * previous to the ratification of the Constitution aforesaid on the part of the State of North Carolina. * *

* * 14. That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years.

15. That the judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different States. The judicial power shall extend to all cases in law and equity arising under treaties made or which shall be made under the authority of the United States ; to all cases affecting ambassadors, other foreign ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States and between parties claiming lands under the grants of different States. In all cases affecting ambassadors, other foreign ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; in all other cases before mentioned the Supreme Court shall have appellate jurisdiction as to matters of law only, except in cases of equity and of admiralty and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make. But the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in disputes between States about their territory, disputes between persons claiming lands under the grants of different States and suits for debts due to the United States."

Observations leading to a fair examination of the system of government proposed by the late Convention, and to several essential and necessary alterations in it in a number of letters from a Federal Farmer to the *Republican*. * * * * * * (p. 25).

OCTOBER 8th, 1787.

DEAR SIR: * * * * There are some powers proposed to be lodged in the general government in the judicial department I think very unnecessary. I mean powers respecting questions arising upon the internal laws of the

respective States. It is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the Union. By Art. 3, Sect. 2, the powers of the federal judiciary are extended (among other things) to *all cases* between a State and citizens of another State—between citizens of different States—between a State or the citizens thereof and foreign States, citizens or subjects. Actions in all these cases, except against a State government, are now tried and finally determined in *the law courts of the States respectively;* and as there are no words to exclude these courts of their jurisdiction in these cases, they will *have concurrent jurisdiction* with the inferior federal courts in them, and, therefore, if the new Constitution be adopted without any amendment in this respect, all those numerous actions now brought in the State courts between our citizens and foreigners, between citizens of different States, by State governments against foreigners, and by State governments against citizens of other States, will also be brought in the federal courts, and an appeal will lay in them from the State court or federal inferior courts to the supreme judicial court of the Union. In almost all these cases either party may have trial by jury in the State courts; excepting paper money and tender laws, which are wisely guarded against in the proposed Constitution, justice may be obtained in these courts on reasonable terms. They must be more competent to proper decisions on the laws of their respective States than the federal courts can possibly be. I do not in any point of view see the need of opening a new jurisdiction to these cases—of opening a new scene of expensive law suits—of suffering foreigners and and citizens of different States to drag each other many hundreds of miles to the federal courts. It is true those courts may be so organized by a wise and prudent legislature as to make the obtaining of justice in them tolerably easy. They may in general be organized on the common law principles of the country; but this benefit is by no means secured by the Constitution. The trial by jury is secured only in those criminal cases to which the federal laws will extend—as crimes committed on the seas against the laws of nations, treason and counterfeiting the federal securities and coin; but even in these cases the jury trial of the vicinage is not secured—particularly in the large States a citizen may be tried for a crime committed in the State, and yet tried in some States 500 miles from the place where it was committed; but the jury trial is not secured at all in civil cases. Though the Conventions have not established this trial, it is to be hoped that Congress in putting the new system into execution will do it by a legislative act in all cases in which it can be done with propriety. Whether the jury trial is not excluded [in] the Supreme Judicial Court is an important question. By Art. 3, Sect. 2, all cases affecting ambassadors, other public ministers and consuls, and in those cases in which a State shall be party, *the Supreme Court shall have jurisdiction*. In *all* the other cases before mentioned, the *Supreme Court* shall have *appellate jurisdiction*, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. By "court" is understood a Court consisting of judges, and the idea of a jury is excluded. This Court or the judges are to have jurisdiction on appeals in all the cases enumerated as to law and fact. The judges are to decide the law and try the facts, and the trial of the facts being assigned to the judges by the Constitution, a jury for trying the facts is excluded. However, under the excep-

tions and powers to make regulations, Congress may perhaps introduce the jury to try the facts in the most necessary cases.

There can be but one Supreme Court in which the final jurisdiction will centre in all Federal causes, except in cases where appeals by law shall not be allowed. The judicial powers of the federal courts extend in law and equity to certain cases, and therefore the powers to determine on the law in equity and as to the fact all will concentre in the Supreme Court. These powers which by the Constitution are blended in the same hands, the same judges, are in Great Britain deposited in different hands, to wit, the decision of the law in the law judges, the decision in equity in the Chancellor, and the trial of fact in the jury. It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for, if the law restrain him, he has only to step into his shoes of equity and give what judgment his reason or opinion may dictate. We have no precedents in this country as yet to regulate the divisions in equity as in Great Britain. Equity, therefore, in the Supreme Court for many years will be mere discretion. I confess in the Constitution of this Supreme Court as left by the Constitution I do not see a spark of freedom or a shadow of our own or the British common law.

This Court is to have appellate jurisdiction in all the other cases before mentioned. Many sensible men suppose that cases before mentioned respect as well criminal cases as the civil ones mentioned antecedently in the Constitution. If so, an appeal is allowed in criminal cases—contrary to the usual sense of law. How far it may be proper to admit a foreigner or a citizen of another State to bring actions against State Governments, which have failed in performing so many promises made during the war, is doubtful. *How far it may be proper so to humble a State as to oblige it to answer to an individual in a Court of law is worthy of consideration. The States are now subject to no such actions,* and this new jurisdiction will subject the States and many defendants to actions and processes which were not in the contemplation of the parties when the contract was made. All engagements existing between citizens of different States, citizens and foreigners, States and foreigners, and States and citizens of other States, were made, the parties contemplating the remedies then existing on the laws of the States—and the new remedy proposed to be given to the federal courts can be founded on no principle whatever.

Extracts from the Letters of Brutus in the *New York Journal* and *Weekly Register*, printed and published by Thomas Greenleaf, at the printing office, No. 25 Water Street, New York City.

New York Journal, &c.—October 18, 1787:

Letters of Brutus, No. I.

To the Citizens of the State of New York:

When the public is called to investigate and decide upon a question, in which not only the present members of the community are deeply interested, but upon which the happiness and misery of generations yet unborn is, in great measure, suspended, the benevolent mind cannot help feeling itself peculiarly interested in the result. * * * Encouraged by this consideration, I

have been induced to offer my thoughts upon the present important crisis of our public affairs. * * *

The judicial power of the United is to be vested in a Supreme Court and such inferior courts as Congress may, from time to time, ordain and establish. The powers of these courts are very extensive. *Their jurisdiction comprehends all civil causes except such as arise between citizens of the same State*, and it extends to all cases in law and equity arising under the Constitution. One inferior court must be established, I presume, in each State at least, with the necessary executive officers appendant thereto. It is easy to see that in the common course of things these courts will eclipse the dignity and take away from the respectability of the State Courts. These courts will be in themselves totally independent of the States, deriving their authority from the United States and receiving from them fixed salaries; and, in the course of human events, it is to be expected that they will swallow up all the powers of the courts in the respective States." * * *

New York Journal—January 31, 1788:

Letters of Brutus, No. XI.

To the Citizens of the State of New York:

* * * * * * * *

First, examine the nature and extent of the judicial powers, and, secondly, enquire whether the Courts, who are to exercise them, are so constituted as to afford a reasonable amount of competence that they will exercise them for the general good.

With regard to the nature and extent of the judicial powers, I have to regret my want of capacity to give that full and minute explanation of them that the subject merits. To be able to do this, a man should be possessed of a degree of law knowledge far beyond what I pretend to. A number of hard words and technical phrases are used in this part of the system, as to the meaning of which gentlemen learned in the law differ. Its advocates know how to avail themselves of these phrases. In a number of instances, where objections are made to the powers given to the judicial, they give such an explanation to the technical terms as to avoid them. Though I am not competent to give a perfect explanation of the powers granted to this department of the government, I shall yet attempt to trace some of the leading features of it, from which I presume it will appear *that they will operate to a total subversion of the State judiciaries*, if not to the legislative authority of the States.

In Article 3, Section 2, it is said: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," &c. The first article to which this power extends is "all cases in law and equity arising under this Constitution." The latitude of construction this clause should receive it is not easy to see. At first view one would suppose that it meant no more than this: that the Courts, under the general government, should exercise not only the powers of Courts of Law, but also that of Courts of Equity, in the manner in which those powers are usually exercised in the different States. But this cannot be the meaning, because the next clause au-

thorizes the Courts to take cognizance of all cases in law and equity arising under the laws of the United States. This last article I conceive conveys as much power to the general judicial as any of the State Courts possess. The cases arising under the Constitution must be different from those arising under the laws, or else the two clauses mean exactly the same thing. The cases arising under the Constitution must include such as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it.

This article, therefore, vests the judicial with a power to resolve all questions that may arise on any case on the construction of the Constitution, either in law or in equity.

1st. They are authorized to determine all questions that may arise upon the meaning of the Constitution in law. This article vests the Courts with authority to give the Constitution a legal construction, or to explain it according to the rules laid down for confirming a law. These rules give a certain degree of latitude of explanation. According to this mode of construction, the Courts are to give such meaning to the Constitution as comports best with the common and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use rather than their grammatical propriety. Where words are dubious, it will be explained by the context. The end of the clause will be attended to, and the words will be understood as having a view to it, and the words will not be so understood as to bear no meaning, or a very absurd one.

2d. The judicial are not only to decide questions arising upon the meaning of the Constitution in law, but also in equity. By this they are empowered to explain the Constitution according to the reasoning and spirit of it, without being confined to the words or letter.

* * * * * * * * *

They will give the sense of every article of the Constitution that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine according to what appears to them the reason and spirit of the Constitution. The opinions of the Supreme Court, whatever they may be, will have the force of law, because there is no power provided in the Constitution that can correct their errors or control their adjudications. From this Court there is no appeal. And I conceive the Legislature themselves cannot set aside a judgment of this Court, because they are authorized by the Constitution to decide in the last resort. The Legislature must be controlled by the Constitution, and not the Constitution by them. They have, therefore, no more right to set aside any judgment pronounced upon the construction of the Constitution than they have to take from the President the chief command of the army and navy, and commit it to some other person. The reason is plain. The judicial and executive derive their authority from the same source that the Legislature does theirs, and, therefore, in all cases where the Constitution does not make one responsible to or controllable by the other, they are altogether independent of each other.

The judicial power will operate to effect in the most certain yet silent and imperceptible manner what is evidently the tendency of the Constitution. I

mean *an entire subversion of the* legislative, executive and *judicial powers of the individual States.* Every adjudication of the Supreme Court on any question that may arise upon the nature and extent of the general government will affect the limits of the State jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

New York Journal—February 14, 1788:

Letters of Brutus No. XII.

* * * I would here observe that the judicial power extends expressly to all civil cases that may arise *save such as arise between citizens of the same State*—with this exception and those of that description—that the judicial of the United States have cognizance or cases between citizens of the same State, claiming lands under grants of different States. Nothing more, therefore, is necessary to give the courts of law under this Constitution complete jurisdiction of all civil causes, *but to comprehend cases between citizens of the same State, not included in the foregoing exception.*

I presume there will be no difficulty in accomplishing this. Nothing more is necessary than to set forth in the process that the party who brings the suit is a citizen of a different State from the one against whom the suit is brought, and there can be little doubt but that the court will take cognizance of the matter; and, if they do, who is to restrain them?

Indeed, I will freely confess that it is my decided opinion that the courts ought to take cognizance of such cases under the powers of the Constitution; for one of the great ends of the Constitution is "to establish justice." This supposes that this cannot be done under the existing governments of the States, and there is certainly as good reason why individuals living in the same State should have justice, as those who live in different States. Moreover, the Constitution expressly declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It will, therefore, be no fiction for a citizen of one State to set forth in a suit that he is a citizen of another, for he that is entitled to all the privileges and immunities of a country is a citizen of that country; and, in truth, the citizen of one State will under this Constitution be a citizen of every State.

But supposing that a party who alleges that he is a citizen of another State has recourse to fiction in bringing in his suit; it is well known that the courts have high authority to plead to justify them in suffering actions to be brought before them by such fictions. In my last number I stated that the court of exchequer tried all causes in virtue of such a fiction. The Court of King's Bench in England extended their jurisdiction in the same way. Originally this court held pleas in civil cases only of trespasses, and other injuries alleged to be committed *vi et armis.* They might likewise, says Blackstone, upon the division of *aula regia* have originally held pleas of any other civil action whatsoever (except in real actions, which are now very seldom in use), provided the defendant was an officer of the court or in the custody of the marshal or prison keeper of this court for breach of the peace, etc. In process of time by a fiction this court began to hold pleas of any personal action whatever, it being surmised that

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defendant has been arrested for a supposed trespass, that "he has never committed, and being thus in the custody of the marshal of the court, the plaintiff is at liberty to proceed against him for any other personal injury, which surmise, being in the marshal's custody, the defendant is not at liberty to dispute."

By a much less fiction may the pleas of the courts of the United States extend to cases between citizens of the same State.

I shall add no more on this head, but proceed briefly to remark in what way this power will diminish and destroy both the legislative and judicial authority of the States.

It is obvious that these courts will have authority to decide upon the validity of the laws of any of the States, in all cases where they come in question before them. Where the Constitution gives the General Government exclusive jurisdiction, they will adjudge all laws made by the States in such cases void *ab initio*. Where the Constitution *gives them concurrent jurisdiction*, the laws of the United States must prevail, because they are the supreme law. In such cases, therefore, the laws of the State Legislatures must be repealed, restricted, or so construed as to give full effect to the laws of the Union on the same subject. From their remarks, it is easy to see that in proportion as the General Government acquires power and jurisdiction by the liberal construction which the judges may give the Constitution, will those of the States lose its rights, until they become so trifling and unimportant as not to be worth having. I may be much mistaken if this system will not operate to effect this with as much celerity as those who have the administration of it will think prudent to suffer it. The remaining objections to the judicial power shall be considered in a future paper.

New York Journal—February 21, 1788.

Letters of Brutus, No. XIII.

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Having in the two preceding numbers examined the nature and tendency of the judicial power as it respects the explanation of the Constitution, I now proceed to the consideration of the other matters of which it has cognizance. The next paragraph extends its authority to all cases in law and equity arising under the laws of the United States. This power, as I understand it, is a proper one. The proper province of the judicial power in any government is, as I conceive, to declare what is the law of the land—to explain and enforce those laws which the Supreme Court or Legislature may pass—but not to declare what the powers of the Legislature are. I suppose the cases in equity under the laws must be so construed as to give the Supreme Court not only a egal but an equitable jurisdiction of cases which may be brought before them, or, in other words, so as to give them not only the powers which are now exercised by our courts of law, but those also which are now exercised by our court of chancery. If this be the meaning, I have no other objection to the power than what arises from the undue extension of the legislative power. For I conceive that the judicial power should be commensurate with the legislative; or, in other words, the Supreme Court should have authority to deter-

mine questions arising under the laws of the Union. * * * * Cases affecting ambassadors, public ministers and consuls—of admiralty and maritime jurisdiction—controversies to which the United States are a party, and controversies between States—it is proper should be under the cognizance of the courts of the Union, because none but the General Government can or ought to pass laws on their subjects. But I conceive the clause which extends the power of the judicial to controversies arising between a State and citizens of another State improper in itself, and will in its exercise prove most pernicious and destructive.

It is improper, because it subjects a State to answer in a court of law to the suit of an individual. This is humiliating and degrading to a government, and what I believe the supreme authority of no State ever submitted to. The States are now subject to no such actions. All contracts entered into by individuals with States were made upon the faith and credit of the States, and the individual never had in contemplation any compulsory mode of obliging the government to fulfill its engagements. The evil consequences that will flow from the exercise of this power will best appear by tracing it in its operation.

The Constitution does not direct the mode in which an individual shall commence a suit against a State, or the manner in which the judgment of the Court shall be carried into execution; but it gives the legislature full power to pass all laws which shall be proper and necessary for the purpose; and they certainly must make provision for this purpose, or otherwise the power of the judicial will be nugatory. For to what purpose will the power of a judicial be, if they have no mode in which they can call the parties before them? Or of what use will it be to call the parties to answer, if, after they have given judgment, there is no authority to execute the judgment? We must, therefore, conclude that the legislature will pass laws which will be effectual in this head. An individual of one State will then have a legal remedy against a State for any demand he may have against a State, to which he does not belong. Every State in the Union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer—*at least this is the case in this State. Whenever a citizen of another State becomes possessed of one of these notes, he may commence an action in the Supreme Court of the general government, and I cannot see any way in which he can be prevented from recovering.* It is easy to see that, when this once happens, the notes of the State will pass rapidly from the hands of citizens of the State to those of other States. And when the citizens of other States possess them, they may bring suits against the State for them, and by this means judgments and executions may be obtained against the State for the whole amount of a State debt. It is certain the State, with the utmost exertions it can make, will not be able to discharge the debt she owes under a considerable number of years; perhaps with the best management, it will require twenty or thirty years to discharge it. This new system will protract the time in which the ability of the States will enable them to pay off their debt, because all the funds of the State will be transferred to the general government, except those which arise from internal taxes.

The situation of the States will be deplorable. By this system they will surrender to the general government all the means of raising money, and a

the same time will subject themselves to suits at law for the recovery of debts they have contracted in effecting the Revolution.

The debts of the individual states will amount to a sum exceeding the domestic debt of the United States. These will be levied upon them with power in the judicial of the general government to enforce their payment, while the general government will possess an exclusive command of the most productive funds from which the States can derive money, and a command of every other source of revenue paramount to the authority of any State.

It may be said that the apprehension that the judicial power will operate in this manner is merely visionary, for that the legislature will never pass laws that will work these effects; or, if they were disposed to do it, they cannot provide for levying an execution on a State, for where will the officer find property whereon to levy. To this I would reply that this is a power which will not, or cannot be executed. It was useless and unwise to grant it to the judicial. For what purpose is a power given, which it is imprudent or impossible to exercise? If it be improper, they should not be vested with it; and it is unwise to authorize a government to do what they cannot effect. As to the idea that the Legislature cannot provide for levying an execution on a State, I believe it is not well founded. I presume the last paragraph of the eighth section of article first, gives Congress express power to pass any laws they may judge proper and necessary for carrying into execution the power vested in the judicial department, and they must exercise this power, or otherwise the courts of justice will not be able to carry into effect the authority with which they are invested: for the Constitution does not direct the mode in which the courts are to proceed to bring parties before them to try causes, or to carry the judgments of the courts into execution. Unless they are pointed out by law, how are they to proceed in any of the cases of which these have cognizance? They have the same authority to establish regulations in respect to these matters where a State is a party, as where an individual is a party. The only difficulty is, on whom shall process be served when a State is a party, and how shall execution be levied? With regard to the first the way is easy. Either the executive or legislature of the State may be notified, and upon proof being made of the service of the notice, the court may proceed to a hearing of the cause. Execution may be levied on any property of the State, either real or personal. The treasury may be seized by the officers of the general government, or any lands or property of the State may be made subject to seizure and sale, to satisfy any judgment against it. Whether the estate of any individual citizen may not be made answerable for the discharge of judgments against the State may be worth consideration. In some corporations this is the case. If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress will crush the States beneath its weight. And, if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning For if a citizen of one State possessed of a written obligation, given in possession of a solemn act of the Legislature, acknowledging a debt to the bearer, and promising to pay it, cannot recover in the Supreme Court, I can conceive of no case in which they can recover. And it appears to me ridiculous to provide for obtaining judgment against a State without giving the means of levying execution.

New York Journal—February 28, 1788.

Letters of Brutus, No. XIV.

* * * * The second paragraph of Sect. 2, Art. 3, is in these words: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Although it is proper that the Courts of the general government should have cognizance of all matters affecting ambassadors, foreign ministers and consuls, yet I question much the propriety of giving the Supreme Court *original jurisdiction in all cases of this kind.*

Ambassadors and other public ministers claim, and are entitled by the law of nations to certain privileges and exemptions, both for their persons and their servants. The meanest servant of an ambassador is exempted by the law of nations from being sued for debt. Should a suit be brought against such an one by a citizen thorough in advertency or want of information, *he will be subject to an action in the Supreme Court.* All the officers concerned in issuing or executing the process will be liable to like actions. Thus may a citizen of a State be compelled at great expense and inconveniency to defend himself against a suit brought against him *in the Supreme Court*, for inadvertently commencing an action against the most menial servant of an ambassador for a just debt.

The appellate jurisdiction granted to the Supreme Court in this paragraph has justly been considered as one of the most objectionable parts of the Constitution. Under this power *appeals* may be had from the inferior Courts *to the supreme in every case* to which the judicial power extends, *except in the few instances in which the Supreme Court will have original jurisdiction.* By this article, appeals will lie to the Supreme Court in all criminal as well as civil causes. This I know has been disputed by some, but I presume the point will appear clear to any one who will attend to the connection of this paragraph with the one which precedes it. In the former all the cases to which the power of the judicial shall extend, whether civil or criminal, are enumerated. There is no criminal matter to which the judicial power of the United States will extend but such as are included under some one of the cases specified in this section, for this section is intented to define all cases of every description to which the power of the judicial shall reach. *But in all these cases it is declared the Supreme Court shall have appellate jurisdiction, except in those which affect ambassadors, other public ministers and consuls, and those in which a State shall be a party.* If then this section extends the power of the judicial to criminal cases, it allows appeals in such cases. If the power of the judicial is not extended to criminal matters, by this section, I ask by what part of this system does it appear that they have any cognizance of them?

I believe it is a new and unusual thing to allow appeals in criminal matters. It is contrary to the sense of our laws, and dangerous to the lives and liberties of the citizens. As our law now stands, a person charged with a crime has a right to a fair and impartial trial by a jury of his country, and their verdict is a final. If he is acquitted, no other court can call him to answer

for the same crime. But by this system a man may have had ever so fair a trial, have been acquitted by ever so respectable a jury of his country, and still the officer of the government who prosecutes may appeal to the Supreme Court. The whole matter may have a second hearing. By this means persons who may have disobliged those who execute the general government may be subjected to intolerable oppression. They may be kept in long and ruinous confinement, and exposed to heavy and insupportable charges to procure the attendance of witnesses, and provide the means of their defense, at a great distance from their places of residence.

I can scarcely believe there can be a considerate citizen of the United States that will approve of this appellate jurisdiction as extending to criminal cases, if they will give themselves time for reflection. Whether the appellate jurisdiction, as it respects civil matters, will not prove injurious to the rights of the citizens, and destructive of those privileges which have ever been held sacred by Americans, and whether it will not render the administration of justice intolerably burthensome, intricate and dilatory, will best appear when we have considered the nature and operation of this power.

It has been the fate of this clause, as it has of most of those against which unanswerable objections have been offered, to be explained different ways by the advocates and opponents of the Constitution. I confess I do not know what the advocates of the system would make it mean, for I have not been fortunate enough to see in any publication this clause taken up and considered. It is certain, however, they do not admit the explanation which those who oppose the Constitution give it, or otherwise they would not so frequently charge them with want of candor for alleging that it takes away the trial by jury. Appeals from the inferior to the superior court as practised in the civil law courts are well understood. In these courts the judges determine both on the law and the fact, and appeals are allowed from the inferior to superior courts on the whole merits. The superior tribunal will reëxamine all the facts as well as the law, and frequently new facts will be introduced, so as many times to render the cause in the court of appeals very different from what it was in the court below.

If the appellate jurisdiction of the Supreme Court be understood in the above sense, the term is perfectly intelligible. The meaning then is that in all the civil cases enumerated, the Supreme Court shall have authority to reëxamine the whole merits of the case, both with respect to the facts and the law, which may arise under it, without the intervention of a jury. That this is the sense of that part of the system appears to me clear from the express wording of it—"in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact," &c.

Who are the Supreme Court? Does it not consist of the judges? And they are to have the same jurisdiction of the fact as they are to have of the law. They will therefore have the same authority to determine the fact as they will have to determine the law, and no room is left for a jury on appeals to the Supreme Court.

If we extend the appellate jurisdiction in any other way, we shall be left utterly at a loss to give it a meaning. The common law is a stranger to any such jurisdiction. No appeals can lie from any of our common law Courts

upon the merits of a case. The only way in which they can go up from an inferior to a superior tribunal is by habeas corpus, before a hearing, or by certiorari or writ of error after they are determined in the subordinate Courts. But in no case when they are carried up are the facts reëxamined, but they are always taken as established in the inferior Court.

The New Haven *Gazette* and the Connecticut *Magazine*, Vol. 2, No. 41—November 29, 1787:

An examination into the leading principles of the Federal Constitution. By a citizen of America.

* * * * Most of the objections I have yet read to the Constitution consist in mere insinuations, unsupported by reasoning or fact. They are thrown out to instil groundless jealousies into the minds of the people, and probably with a hope to prevent all government. For there are in every society some turbulent geniuses whose importance depends solely on faction. To show the insidious and detestable nature of those insinuations it is necessary to mention and remark on a few particulars. * * * * 8. It is intimated as a probable event that the Federal courts will absorb the judiciaries of the several States. This is a mere supposition, without the least foundation. The jurisdiction of the Federal court is very accurately defined and easily understood. It extends to the cases mentioned in the Constitution, and to the execution of the laws of Congress respecting commerce, revenues and other general concerns. With respect to all other civil and criminal actions, the powers and jurisdiction of the several judiciaries of each State remain unimpaired.

Nor is there anything novel in allowing appeals to the superior court. Actions are mostly to be tried in the State where the crimes are committed, but appeals are allowed under our present confederation, and no person complains. Nay, were there no appeal, every man would have reason to complain, especially when a final judgment in an inferior court should affect property to a large amount. But why is an objection raised against an appellate jurisdiction in the supreme court respecting *fact* as well as *law?* Is it less safe to have the opinion of two judges than of one? I suspect some people will think this no defect in the Constitution. But perhaps it will destroy a material requisite of a good jury, viz., their vicinity to the cause of action. I have no doubt that when causes were tried in periods prior to the Christian era before twelve men, seated upon twelve stones, arranged in circular form, under a huge oak, there was great propriety in submitting causes to men *in the vicinity*. The difficulty of collecting evidence in those rude times rendered it necessary that juries should judge mostly from their own knowledge of facts or from information obtained out of court. But in these polished ages, when juries depend almost wholly on the testimony of witnesses, and when a complication of interests induced by commerce and other causes renders it almost impossible to collect men in the vicinity of the parties who were wholly disinterested, it is no disadvantage to have a cause tried by a jury of strangers. Indeed, the latter is generally the most eligible.

But the truth is, the correction of all inferior courts is in the power of Congress, and the Constitution provides that Congress may make such exceptions from the right of appeal as they shall judge proper. When these Courts are

erected, their jurisdiction will be ascertained, and in small actions Congress will doubtless direct that a sentence of a subordinate Court shall to a certain amount be definitive and final. All objections to the judicial power of the Federal courts appear to me as trifling as any of the preceding.

"The committee on detail provided. * * * * * In cases of impeachment, cases affecting ambassadors and other public ministers and consuls, and those in which a State should be a party, they assigned the original jurisdiction to the Supreme Court. * * The plan of the Committee on Detail contemplated a supreme tribunal with original jurisdiction over a few of the cases within the judicial power, and appellate jurisdiction over all the other cases enumerated." (2 *Curtis on the Const.*, 428.)